THE LAW REGULATING AFFIRMATIVE ACTION: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND UNITED STATES OF AMERICA (USA)

By

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ABSTRACT

This research is a comparative study of affirmative action measures in South Africa and the United States of America. It examines affirmative action measures as a whole. It looks at the reasons for affirmative action; the legal standing of affirmative action; the present day application of affirmative action and the future affirmative action in South Africa The underlying purpose of this research is therefore threefold: Firstly, it provides a historical background to the needs of affirmative action measures. Secondly, it presents a detailed examination of affirmative action measures on a comparative basis and the various provisions that regulates these measures. Finally, the research examines and consider some important lessons that South Africa should bear in mind in its development of affirmative action jurisprudence and in the exercise of such programmes

DECLARATION BY STUDENT

I, Mr Motubatse Harry Thobejane declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws (LLM) in Labour Law has not been previously submitted by me for a degree at this university or any other university that is my own work in design and execution, and all material contained herein has been duly acknowledged.

Signed_____

Date_____

Motubatse Harry Thobejane

AUGUST 2015

DECLARATION BY SUPERVISOR

I, Adv Lufuno Tokyo Nevondwe, hereby declare that this mini-dissertation by Mr Motubatse Harry Thobejane for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

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Adv Lufuno Tokyo Nevondwe

AUGUST 2015

DEDICATION

I dedicate this mini dissertation to my father **George Thobejane** who has always seen good in me, further, I dedicate this work to my colleague at TJ Maodi Incorporated Attorneys.

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LIST OF ABBREVIATIONS

ADA…….American With Disability Act

ADEA…….…..Age Discrimination in Employment Act

ALJ……...Administrative Law Judge

ARB…….….Arbitration

BCEA……....Basic Conditions of Employment Act, 75 of 1997

BLLR…….....Butterworths Labour Law Reports

CC…….Constitutional Court

CCMA……...Commission For Conciliation, Mediation and Arbitration

CFR……...Code of Federal Regulations

EEA……....Employment Equity Act, 55 of 1998

EO……..Executive Order

GG……..Government Gazette

HNP……....Hereinigte National Party

ILJ….....Industrial Law Journal

ILO….....International Labour Organisation

LAC…….…….....…..Labour Appeal Court

LC….....Labour Court

LRA…….....Labour Relations Act, 66 of 1995

NAACP……...….National Association for the Advancement of Coloured People

NACO……..…….National Aids Control Organization

OFCC…….……Office of Federal Contract Compliance

PCEEO…….....President's Committee on Equal Employment Opportunity

PWA……..Public Works Administration

RSA……...Republic Of South Africa

SA…….South Africa

SALLR……..South African Labour Law Report

SC……..…Supreme Court

SCC……...Supreme Court Cases

SCR…….…..Supreme Court Ruling

SDA…….…….Skill Development Act

UC…….....University of California

UCDLR…….....University of California Davis Law Review

UCG ……...……University Grants Commission

USA.....United States of America

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CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study

To understand South Africa's present situation there is a need to look at the country's history since much of what happened in the past forms the basis for action taken in the present. South Africa was a country that was ruled under a political system called "apartheid". Apartheid was based on the policy of segregation of races through legislation.

Racial discrimination was one of the defining features of apartheid in South Africa and had been entrenched in a range of statutory provisions for many decades. These are important as successive projects of government of South Africa used legislation to inhibit the economic resources which were severely restricted through those laws and regulations which were passed.

This chapter will further explore the history of legislation that condoned discrimination of persons in apartheid in South Africa. It will provide a background to the legislation in South Africa and why voluntary actions alone could not suffice to eliminate discrimination. The reason for doing so is to show that discriminatory and segregationist policies were mandated by government and therefore it was vital that the post-apartheid government of South Africa becomes actively involved in eliminating discrimination. It will be shown that the many years of apartheid marginalised blacks not only from political power but also from economic participation as well, and reliance on labour-market.
While cases of racial discrimination occur in others parts of the world, in South Africa it was the systematic, official and legal character of apartheid that made South Africa unique. It will be shown how black South Africans were restricted in their access to jobs and to economic resources. Apartheid sought to regulate human relations along racial lines. This has adversely affected all spheres of political, economic, social and cultural life in South Africa[1].

South Africa is emerging from a period in which the lack of freedom, human dignity, discrimination and inequalities were the antithesis of a democratic country. The apartheid social and legal system has had a devastating effect on the social, economic, political and cultural life of black South Africans. Apartheid is an Afrikaans word meaning 'separation'. In English it has become known as the deliberate system of racial discrimination exercised by a privileged white minority group against the black majority, such as existed in the Republic of South Africa between 1948 and 1990[2]. Apartheid was reinforced when successive governments of South

[1] http://www.historyworld.net
[2] John Iliffe, Africans, The history of a continent by press syndicates of the university of cambridge

Africa used legislation to inherit the economic, social and political advancement of blacks. Black South Africans were therefore restricted in their access to jobs and to economic resources.

South African's past has been described as that of a "deeply divided society characterised by strife, conflict, untold sufferings and injustice" and which "generated gross violations of human rights, the transgression of humanitarian principle in violent conflict and a legacy of hatred, fear, guilt and revenge". Keeping in mind that from the outset apartheid SA attempted to maintain a colonial heritage of racial discrimination, a discussion of how such heritage was inherited follows.[3]

The discovery of diamonds and gold deposits in South Africa resulted in an invasion by the English and from the seventeenth century onwards South Africa was completely colonised by the Dutch and English.[4] The British government, attracted by the prospect of mineral wealth, annexed the diamond fields. These mineral discoveries had a radical impact on every sphere of society. Importantly, labour was required on a massive scale. Four mines were developed, and the town of Kimberly was established. This town became the largest urban society in the interior of Southern Africa in the 1870's and the 1880's. In response to the expansion of internal markets, Africans participated actively in the new industrial economy. African farmers in British Basutoland, the Cape and Natal also greatly expanded their production of foodstuff to meet the rising demand throughout Southern Africa. Out of this development a relatively prosperous peasantry emerged. They supplied the new towns of the interior as well as the coastal ports. The growth of Kimberly and other towns also provided new economic opportunities for Coloureds, many of whom were skilled tradesmen, and for Indians, who once they had completed their contracts on the sugar plantations, established shops selling goods to African customers. For the white authorities, however, the chief consideration was ensuring a labour supply and undermining black competition on the land. Mine-owners sought to undercut the bargaining strength of the Africans on whom they depended for labour. In 1872 the British colonial administration was persuaded by Kimberly's white claims-holders to introduce a pass law.

The European settlers therefore dominated the indigenous population through political control of land and wealth. By the end of the nineteenth century, SA had been completely colonised by the British. When the Europeans, led by the Dutch colonist arrived in SA, they drove many native Africans from their home thereby creating a divided SA. This division was along racial lines and SA then became divided between the Dutch colonist, known as the Afrikaners, and the natives. They introduced racially discriminatory legislation to force natives *Khoi-Khoi* and other so-

[3] Coleman M (ed) A Crime Against Humanity – Analysing the Repression of the Apartheid state (1998) (Coleman) at www.sahistory.org.za

[4] The British protectorate established in Lesotho

called "free" blacks to work for as little as possible. Further, the "*Hottentots"* Code of 1809 required that all *Khoi-Khoi* and other free blacks carry the stating where they lived and who their employers were[5]. Persons without such passes could be forced into employment by white masters.

In 1886 the "closed compounds", which were fenced and guarded institutions in which all black diamond mine workers had to live in for the duration of their labour contract was formed"[6]. These close compounds were replicated at the gold mines.[7] The preservation of communal areas[8] had the effect of lowering wages by denying Africans rights within the urban areas and keeping their families and dependents on subsistence plots in the reserves.[9] Africans could be denied basic rights if the fiction could be maintained that they did not belong in "white South Africa" but to the "Tribal societies" from which they came to service the "white man's needs". This set of assumptions and policies represented the origins of a segregationist ideology, and later apartheid.

The institutionalisation of such discriminatory practices marked a major turnabout in the British administration of law. The previous official policy that all people irrespective of colour be treated equally, while still accepted in legal theory, was now largely ignored in judicial practice.

SA's first industrial city thus developed into a community in which discrimination became entrenched in the economic and social order, not because of the desire of cheap labour. A power struggle now existed between the Dutch (Boers) and the British. Due to these tensions of the two groups between the Europeans and the Boers, the Anglo-Boer War resulted in a very good transition.

During the time of the Anglo-Boer War, many black farmers were in the position to meet the demand for produce, or to avail themselves of employment opportunities at good wages. They therefore benefited from the war but these benefits did not last for very long. The signing of the treaty of Vereeniging, that ended the Boer War, left the issue of rights of Africans, to be decided by a future self-governing (white) authority. After the signing of the Treaty the priority to the succeeding government was to re-establish white control over the land and force the Africans back to wage labour. Britain implemented a decision to give power to the Boers, from 1906-

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[5] The British government, acting largely at the behest of the missionaries and their supporters in Britain in the 1820's, abolished the Hottentots Code. Specifically, Ordinance 50 of 1828 stated that "no Khoi-Khoi or free black had to carry a pass or could be forced to enter a labour contract".

[6] The close compounds were first developed on the diamond fields as a means of migrant labour control.

[7] The South African Yearbook History – Humankind at its earliest origins in Africa 2000/01. The Early Inhabitants (2001) GCIS (The South African Yearbook).

[8] Coloured Persons Communal Reserves Act 3 of 1969.

[9] Hamilton C Terrific Majesty – The Powers of Shaka Zulu and the limits of Historical Intervention (1998).

1907, by granting constitutions which gave Afrikaners political control of both ex-Republics. So, even though the Boers lost the Anglo-Boer war, they were granted powers so as to ensure that the British still retained considerable influence in South Africa. This was largely at the expense of Africans, who were excluded from political power and forced to give back much of the land that was retaken from the Boers during the war years.

The outbreak of World War II in 1939 had a profound effect on SA both economically and socially. While gold continued to be the most important industry, providing two-thirds of SA's revenues and three quarters of its export earnings, manufacturing grew enormously to meet the wartime demands. Between 1939 and 1945, the number of people employed in manufacturing, many of them woman, rose by approximately sixty per cent. Urbanisation also increased rapidly. By 1946 there were more Africans (Blacks) in SA's towns and cities than were whites. Many of these blacks lived in squatter communities established on the outskirts of major cities such as Cape Town and Johannesburg. Such developments although necessary for war production, contradicted the segregationist ideology that blacks should live in their rural locations and not become urban residents. More unsettles were the development of new black organisations that demanded official recognition of their existence and better treatment of their members. Urban black workers, demanding higher wages and better working conditions, also their own trade unions and engaged in a rash of strikes throughout the early 1940's. By 1946 the Counsel of Non-European Trade Unions (CNETU), was formed claimed 158,000 members organised in 119 unions. The most important of these trade unions was the African Mineworkers Union (AMWU), which by 1944 claimed a membership of 25.000. In 1946 AMWU struck for higher wages in the gold mines and succeeded in getting 60,000 men to stop work. The strike was crushed by police actions that left twelve dead, but it demonstrated the potential strength of organised black workers in challenging the cheap labour system.

Going in to the South African election of 1948, Smuts governing United Party based their political platform on a report of the Native Laws Commission from the Fagan Commission, a committee assigned to investigate the racial divisions of SA.[10] The commission found that due to the migration of Africans[11] to the cities and the lack of African reserves, complete segregation was impossible.[12] Although it did not recommend social or political integration the Commission suggested that African labour should be established in the cities, where the needs of industrial and commercial operations were greatest. In the US the National Hispanic Party's platform

[10] UNESCO Africa under Colonial Domination 1880-1935 (1985) V (VII) at 60 (UNESCO).

[11] Between 1939and 1945 South African urbanisation grew, and by 1946 there more blacks than whites in the cities of South Africa. See UNESCO op cit 43

[12] UNESCO op cit 43 at 65. The HNP argued the opposite, that only a total segregation of the races would prevent eventual movements for equality and subversion of white society by blacks. The HNP also stated that natives should be viewed as temporary residents in the cities and should occasionally be relocated back to rural areas. The HNP's segregationist platform, known as apartheid, was successful, and Malan defeated Smuts and the

(NHP), based on a report by Paul Sauer,[13] found the contrary. The National Hispanic Party believed that only total separation of the races would prevent a move toward equality and eventual overwhelming of the white society by blacks. The NHP stated that Africans should be viewed only as temporary dwellers in the cities and should be forced periodically to return to the countryside to meet the labour needs of farmers.

Afrikaans Nasionale Party van Suid-Afrik (ANPSA) won the elections and was later renamed the National Party (NP). Once in power, Malan and the NP began to embed apartheid in SA's legal system. They did this by providing a legal basis for preferential treatment of whites and the NP was therefore able to secure its power for future elections. Racial segregation and the supremacy of whites were traditionally stated that Africans not accepted in SA prior to 1948. However in the general election of 1948 Malan officially included the policy of apartheid in the Afrikaner National Party platform for the first time. Apartheid therefore formally began with the 1948 election. The purpose of apartheid was the separation of races: not only of whites from non-whites but also non-whites from each other. The NP believed that a definite policy of separation between the white races and the non-white racial groups together with the application of the policy of separation was the only basis on which the character and future of each race could be protected and safe-guarded.

With the enactment of the apartheid laws in 1948, racial discrimination was further institutionalised. Race laws touched every aspect of social life and this included the prohibition of marriages between non-whites and whites and also the sanctioning of "white-only" jobs.
A new concern for racial purity was apparent in laws of prohibiting interracial sex and marriages and in provisions requiring every South African to be assigned to one racial category or another. For the first time coloured people, who always had been subject to informal discrimination, were brought within the ambit of discriminatory laws.

In the mid 1950's, the government overrode an entrenchment clause in the 1910 Constitution so as to be able to remove coloured voters from the common votes' roll. It also enforced residential segregation, expropriating homes where necessary and policing forced removals into coloured "Group's Areas". Until the 1940s, SA's race policies had not been entirely out of step with those to be found in the colonial world. However by the 1950's, during the period of decolonisation and anti-racism sentiments around the globe, SA was opposed to world opinion on the question of human rights. Their policy of apartheid, which they termed "separate development", divided the African population into artificial ethnic nations, each with its own "homeland" and prospects of independence. The NP's apartheid policy was therefore based on the idea that SA comprised of a number of nations and that each nation should be allowed to develop within its own

[13] In 1947 Malan appointed his closest associate, Paul Sauer, to head a party commission to turn apartheid into a comprehensive racial policy

associations and tribal affiliations exercised within these homelands. In terms of this theory they would thus have no claim to any civil or political rights within the rest of 'white SA'.

The purpose of creating independent homelands was to facilitate the process of denationalisation. All persons who were remotely linked to these homelands were denied their South African citizenship and, had imposed upon them the citizenship of the "independent homeland".

Racial discrimination had been one of the defining features of apartheid in SA, and had been entrenched in a range of statutory provisions for many decades. Several pieces of legislation marked the establishment of the Union of South Africa, as stated, in which racial discrimination received official sanction. In the area of employment the most telling legislative measures designed to afford racial privileges were those laying the basis for the policy of job reservation. Over the years, the government introduced a series of repressive laws. It is however, beyond the scope of this research to list all the discriminatory laws that were passed against the black people. Repressive legislation like the Industrial Conciliation Act[14] was passed as affirmative action for whites against cheap black labour. This gave control of entry to the trade of white unions. The Native Building Workers Act[15] prohibited blacks from doing skilled construction in urban areas. In 1937 the government employed approximately 10 000 Europeans on types of works previously done by natives. The Public Works Department employed the policy of hiring only Europeans in the Orange Free State, Natal and Transvaal.

Two legislative pillars of apartheid; the Natives Land Act (and its amendment in 1936) and the Group Areas Act[16] limited African economic and business activities in both rural and urban areas. These Acts were repealed in 1991, but few blacks could yet afford to move into formerly white areas without financial assistance. Numerous other laws and regulations such as Group Areas Act had restricted black economic activities and employment.

By 1950'S apartheid had impoverished the South African society. By its segregationist measures such as job, tertiary institutional and economic reservations and by its deliberate policy of creating hierarchy of races, it also impoverished the dignity of the South African people. Reparation measures have to directly address these imperfections if sustainable equality is to be achieved.

In 1991 the Group Areas Act [17] Land Act [18]and the Population Registration Act,[19] the last of the so-called "pillars of apartheid", were abolished. After a long series of negotiations a new

[14] Industrial Conciliation Act 11of 1924
[15] Native Building Workers Act 27 of 1951
[16] Group Areas Act 41 of 1950
[17] 39. Group Areas Act 41 of 1950
[18] Land Act 27of 1913

constitution was promulgated into law in December 1993 (The interim Constitution).[20] It provided a framework for governing for five years, while a new constitution to be implemented by 1999 was drafted by the Constitutional Assembly. The final constitution had to comply with the principles embodied in the interim constitution, including a commitment to a multi-party democracy based on universal adult franchise, individual rights without discrimination, and separation of powers of government. SA held its first democratic election in April 1994 under this interim constitution. The interim constitution was committed to a new constitutional order premised upon an open and a democratic government and universal fundamental human rights. The new constitutional order has, at its core, a commitment to substantive equality and seeks to map out a vision for the Nation based on this commitment.

The African National Congress (ANC) led government then embarked on a programme to promote the reconstruction and development of the country and its institutions. This is called for the pursuit of democratisation and socio-economic changes. A significant milestone of democratisation during the five-year period of the Mandela presidency was the constitution making process. The ethos of democracy was reflected in the establishment of the National Economic Development and Labour Council, and in the Presidential Job Summit.

As can be seen, the history of the South African labour system is a history of workplace struggle for most employees. It is a history of a struggle against inequalities, workplace discrimination, salary disparities, and the recognition of employee rights etc. This history of SA has laid the foundation for a process of change in the workplace. It has been shown how successive governments of SA used legislation to inherit the economic advancement of blacks. Further, blacks access to jobs and to economic resources were severely restricted through a series of laws and regulations. SA`s history has shown how effectively laws, good or bad laws, can achieve its goals through proper and effective monitoring system. Therefore it is not enough that various employment laws are promulgated. What is required is a serious commitment by both the government and private individuals to eliminate discrimination. Since government was so actively involved in legislating discrimination in the past, it is important that it also play a role in eliminating discrimination. However, after decades of segregation policies it is not enough that legislation is implemented which outlaws unfair discrimination, what is needed is a concerted effort from both public and private sectors to ensure that discriminatory practices do not continue and there should be proper monitoring system in place to ensure compliance with these various legislations.

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[19] Population Registration Act 30 of 1950

[20] The Interim Constitution Act 200 of 1993

To understand the current debate over affirmative action in the USA, all of America's racial history from colonial times, through slavery, reconstruction, the Jim Crow era, the civil rights era to the present day must be analysed. The reason for this is that it has been suggested that some time a misunderstanding of the history of affirmative action becomes the fundamental reason that most white people have difficulty in seeing their historical and current counter part.[21] The current scope of affirmative action programmes is best practice to remedy oppression of racial and ethnic[22] however broader discrimination against person because of their race, ethnic background, religion and gender has also been widespread. Some affirmative action began before the promulgation of various civil rights statutes in the 1950's and 1960's, but affirmative action measures did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break the long standing patterns of discrimination. This chapter (a historical background of affirmative action: an overview) highlights employment opportunity, with specific emphasis on the development of affirmative action in the US. It examines the development of public policies designed to eradicate and overcome the effects of economic discrimination.

Economic discrimination has been an inherent feature of race relations in the US since the first blacks arrived in the Northern American colonies in 1619. It was widespread in the North and the South as late as the 1960's, relegated blacks to vastly inferior position within the US economy. The desire for equal employment opportunity was a major feature in the civil rights movement. In the US there is long history of federal action, and inaction, in the area of racial discrimination. The study of America's civil rights law must be looked against the background of its history, "since no other national history holds such a tremendous lesson, for the American people themselves, and for the rest of mankind."[23]

It has been argued that legal racist practices were shaped by slavery and that enslavement powerfully reinforced prejudice like the system of apartheid in S.A that needed to be justified, white American slave owners needed to justify and defend their forms of exploitation, so they claimed that blacks were morally and intellectually inferior to whites.[24] Slavery, thus justified and rationalised, laid the foundations upon which prejudices and legally encoded racism were built.

[21] Rubio Philip A History of Affirmative Action- 1619-200(2001) (Philip) Page 352

[22] Cornel West Race Matters (1993) at 4 (west)

[23] Abraham Lincoln (February 12, 1809 – April 15, 1865) was the 16th President of the United States, serving from March 1861 until his assassination in April 1865

[24] Slavery in the United States was a form of slave labor which existed as a legal institution from the early years of the colonial period

Central to the reason for affirmative action is therefore the history of political, economic and cultural discrimination against blacks, practised in the US. It is also a legacy of colonial practices that began with the European settlement to Americans.[25] America, Britain and few other European countries participated in the trade of slaves. However, even though slavery was later abolished in most of Europe, it continued in the United States. Under slavery, blacks were generally confined to agricultural and domestic work as tools.[26]

In the 1970's the US was divided geographically into slave and non-slave regions and as anti-slavery movement began in North, it led to the enactment of the Northwest Ordinance in

1787.[27] This measure prohibited the introduction of slavery into territories north of the Ohio River. By 1787, slavery had been abolished in some of the Northern states and "populations of black freedom"[28], as they were called began to establish themselves there. The clash between the slavery in the South and anti-slavery sentiment in the North caused a lot of internal tensions in the US. It was about this time that the first Supreme Court (SC). decision on the issue of slavery was decided. The case of *Dred Scott v Sandford* [29]was seen as a disaster by the abolitionists since in that case the Supreme Court held that a slave was property and not a citizen of the US.

The *Dred Scott* case reaffirmed the view of the legal status of black slaves; they were less than fully human being and were mere property. This case could be seen to have fuelled the American Civil War that followed. After the Civil War ended in 1865, the Congress of the US proposed a number of anti-slavery amendments of the Constitution of the US. It framed and recommended to the states three constitutional amendments to end slavery, extend the rights of citizenship to freed Negro slaves, and guarantee their voting rights.

Despite the adoption of the thirteenth, fourteenth and fifteenth amendments to the constitution of the US, the successful transition of blacks from a status of slavery to a status of equal enjoyment of political, economic, educational, and social rights was not a easy one. Due to the past, blacks were for the most part uneducated, poor and politically powerless and more laws were then passed to keep them there. The next major judicial failure occurred in 1896 with the decision of *Plessy v ferguson.*[30] In this case the US Supreme Court (SC) upheld a statute that required or allowed for railroad companies to provide two sets of passenger cars: one for blacks and the other for whites.

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[25] Fredrickson G White Supremacy (1981) at Chapter 2.

[26] It was these prejudices that led to the enactment of the Jim Crow legislation

[27] The German town protest against slavery 1688 is the first known public objective to slaveholding

[28] Affirmative action in the U.S (Theory Practice) by Joseph W Little P.12 to 20

[29] Dred Scott v Sanford 15 LED 691

[30] Plessy v Ferguson (1896)163 us 537.

The achievement of equal protection clause of the fourteenth amendment to the United States Constitution provides the following meaning[31] "...we cannot say that a law which authorises or even requires the separation of the two races in the public conveyances is unreasonable...".[32] This meant that laws could be enacted that separated citizens by the race in schools, transportation, public accommodation etc., as long as the services provided for one race were equal to those for the other.[33] The declaration of independence itself perpetuated the view that the black slaves were less than all men in their creation.[34] Indeed ex-president Abraham Lincoln said that "all men are created equal, except nogroes"[35]. Two months after the ratification of the fifteenth amendment, the same congress passed the 1870 enforcement Act,[36] the essence of the Act could be found in sec 3,4,5 and 6 which outlined the most obvious abuses and provisions for penalties. In various cases the court nullified all four sections. Shortly thereafter the Supreme Court nullified the fifteenth amendment.

A culture of separate and seemingly equal treatment was thus condoned and became known as the Jim Crowism in the South. Jim Crow laws in US history, were statutes enacted by southern states and municipalities, beginning in the 1880's, that legalised segregation between blacks and whites. The SC ruling in1896 in *Plessy v Ferguson* that separated facilities for whites and blacks were constitutional, encouraged the passing of discriminatory laws. This decision erased gains made by blacks during the reconstruction era. White economic benefits from racism were a powerful part of the incentives for Jim Crow laws and apartheid, while racism shaped industrialisation and urbanisation.

In the United States, a Black Hispanic or Afro Hispanic[37] is an American citizen or resident who is officially classified by the United States Census Bureau Office of Management and Budget and other U.S. government agencies as a Black American of Hispanic descent.

During the Hispanic time , racism and segregation in the southern industry adopted a "rigid colour line" this restricted the African Americans to low-paying, less-skilled "Negro jobs" Americans employment opportunities remained seriously scrutinised in the 1970's and whole industries and categories of employment were dominated by white males. Asian American and Hispanic Americans were legally banned from attending some public schools. The civil rights

[31] No state shall ... deny to any person within its jurisdiction the equal protection of the laws
[32] Little *op cit* 9 at 273.
[33] Swann v charlotte-mecklenburg board of education (1971) 402 us 1267 (sc).
[34] The declaration of the independence July 4, 1776.
[35] Basler (ed) collected works of a Lincoln (1971) at 323
[36] Tune R The Past and future of Affirmative Action – A guide and analysis for Human Rescources professional and corporate council (1990) (Tuner)
[37] Spanish: *Afrohispano*, literally, "Afro Hispanic"

movement saw victories with *Brown v Board of Education*[38] and other cases which struck down segregation. The civil rights Act of 1965 also played a role in striking down segregation.

If one looked at the construction trades for example, by 1865 black workers had attained a foothold in the construction trade, but after the war black skilled workers were replaced by whites. This was largely due to the emergence of "modern" construction crafts, for example, electricians and plumbers, in the Jim Crow era. Black construction workers were excluded from these occupations and confined to the less skilled "trowel trades", such as plasterers, bricklayers and unskilled labourers.

1.2 Statement of the research problem.

The research provides a theoretical background to affirmative action. It will focus *inter alia* on the meaning of affirmative action, the intended beneficiaries of affirmative action and the scope of affirmative action measures in the USA and the South Africa. In fact, on a subject as complicated and controversial as affirmative action, it is as well to establish the scope of affirmative action before exploring its implications.

The current scope of affirmative action programmes is best understood as a consequence and continuation of efforts to remedy the oppression of racial and ethnic minorities and of women. In the USA some affirmative action efforts began before the great burst of civil rights statutes in the 1950's and 1960's. However, in the US and South Africa, affirmative action efforts did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination. The historical background to affirmative action in the two countries shows that the approach to affirmative action concentrates on a history of injustice and is an attempt to end discrimination against certain individuals and groups of a population. Affirmative action has also been identified as a means of ending the inequalities faced by these persons in society.

In South Africa there is the history of apartheid and the segregation of white people from black people. In the USA, inter-group relationships play an important part of the history of American culture. This is because, it is not just white versus other people of colour, but there is a history of immigration and to some degree absorption in to white culture by various ethnic groups. Looking at the historical chapters, these groups were identified and organised politically and economically as racially segregated groups at different phases in their histories.

[38] Brown v Board of education 347 U.S. 848 (1954)

Looking at Part I, affirmative action was born in the USA in the mid-1960's. It was the ex-US President Johnson who had introduced it as a policy that would redress racial imbalances that existed in the USA in spite of constitutional guarantees and laws banning discrimination.

What pushes me to research on this topic was that there is no stability within the labour market in general USA and South Africa was identified as most vulnerable countries suffering as a result of this problem.

Obviously where there is discrimination, people suffer injustice, and so my research will aid the manner in which affirmative action is practice both in US and SA. My investigations will look deeper within the working place whether affirmative action is indeed practiced

So affirmative action in USA was initiated to rectify past injustices by racism. In South African affirmative action programmes are primarily aimed at the black majority who has historically suffered great injustices due to the apartheid system. Affirmative action in these two countries is unavoidable when looking at the extent of past discriminatory practices.

1.3 Literature review

Labour Relations Act 66 of 1995

Until the promulgation of the Labour Relations Act (RLA), there were no provisions which prevented an employer from refusing to appoint someone on the basis of, for example. gender, race, or trade union membership.[39] An applicant for work has no standing to declare a dispute with an employer, even though they may have been victim of unfair discrimination.[40] Looking at the history of discrimination in South Africa, employees themselves they have never done anything better. In fact, some legislative provisions specifically permitted discrimination in the workplace.[41]

The commission of Inquiry into Labour Legislation (The Wiehahn Commission), established in the aftermath of the strike wave of the early 1970's, argued that blacks should be allowed to register trade unions and have them recognised as part of the official conciliation process.[42] The Wiehahn commission recommended the incorporation of antidiscrimination principal into South African legislation by stating that it can cannot avoid the conclusion that in the due course discrimination in the field of labour on the ground of race colour sex, political opinion religious

[39] Rycroft and Jordan A Guide to South African Labour Law (1992) at 38.

[40] Thompson & Benjamin South African Labour Law (2002) V (1) No. 43 Part CC1 at CC1-5 (Thompson and Benjamin)

[41] For example The Wage Act 5 of 1957. See Chapter Two of the Act for a more detailed explanation of some of the discriminatory legislation in apartheid-SA.

[42] Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

belief, national extraction or social origin will have to be outlawed and criminalised in south African's labour dispensation.[43]

Legislation incorporation this recommendation was passed in 1979 and resulted in huge growth in African trade unionism in the early 1980s. The LRA contains a number of provisions that specifically prohibits discriminatory treatment of employees and applicants for work. Section 187(1) (f) states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee either directly or indirectly on one or more of a number of non-exhaustive prohibited grounds. The dismissal may however be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee has reached the normal or agreed to retirement age for person employed in that capacity.[44]

The purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. It is noteworthy that in the LRA affirmative action is seen as a means to rectify imbalance in the workplace that resulted from past discrimination.

SA is unique in that it does not deal with the prohibition of unfair discrimination in only one piece of anti-discrimination legislation. It has dealt with this issue in the EEA and the Promotion of Equality Prevention of Unfair Discrimination Act (PEPUDA)[45] as well.

1.3.2 The Promotion of Equality and Prevention of unfair Discrimination Act 4 of 2000

The purpose of PEPUDA is to prevent and prohibit unfair discrimination harassment and hate speech. People who do not fall within the scope of the EEA can bring a claim of unfair discrimination under PEPUDA so for example independent contractors who fall outside the scope of the EEA can be liable or used under PEPUDA.

The legislation does not merely apply in the workplace but also applies to the state and all the individuals living within it. The scope of legal standing established by PEPUDA is extremely broad so that any person can bring a claim of discrimination to the courts in the public interest, even if they are not directly affected themselves. Further PEPUDA defines only four acceptable defences against a claim of discrimination, viz., that the discrimination was not of the type specifically ruled out by the law, that it was reasonable and justifiable; that was part of an affirmative action programme; or that it was justified due to the specific demands of a particular task to adjudicate all claims PEPUDA has establish a system of equality courts with appointees from the human rights field.

[43] Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

[44] Section 187(2) and 11 of the LRA Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

[45] The promotion of equality and the prevention of unfair Act 4 of 2000 enacted in February 200 (PEPUDA)

PEPUDA is intended to be key legislative tool to respect promote and fulfil the equality right. It provides for measure to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination hate speech and harassment and to provide remedies for victims of unfair discrimination .It seeks to translate the equality right into practical rules. In fact PEPUDA is considerably more explicit than the EEA on the content of the core concepts of discrimination law. For example, PEPUDA contains a definition of discrimination[46] and harassment [47] significantly; PEPUDA is a codification of the discrimination courts jurisprudence on discrimination.[48] Therefore PEPUDA will have to be taken into account when the EEA is interpreted by the courts

1.3.3 Basic Condition of Employment Act 75 of 1997

To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of Basic Conditions of Employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provides for matters connected therewith.

1.3.4 Skills Development Act 97 of 1998

The aim of this Act is to provide an institution framework to device and implement the national and workplace training strategies. The purpose is to develop and improve the skills of employees and to integrate those strategies within the national qualification framework. The SDA (The Skill Development Act) is not generally targeted at women although one previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education; the SDA also applies to employment services which assist prescribed categories of person to

1.3.5 Employment Equity Act 55 of 1998

It is the type of discrimination legislation is SAs recent past that provides the justification for the implementation of the EEA. This Act seeks to bring to an end decades of inequalities that are a result to both apartheid policies and societal prejudices and stereotypes. The EEA will seek to ensure that people of SA enjoy equality of opportunities in employment that were hitherto denied to them. This sweeping law direct all employers public and private to eliminate unfair discrimination in the workplace and requires businesses with fifty or more employees and or annual revenues exceeding certain threshold levels to implement affirmative action programmes

[46] See section 1(1) (VIII) of PEPUDA
[47] See section 1(1) of PEPUDA
[48] The constitution courts approach to discrimination will be analysed in part IV of this research.

aimed at blacks women and the disable. The employers who do not comply with the year 2000 create an impact directly on recruitment practices and the composition of the workforce.

The EEA goes further and mandate that "suitably qualified "members of disadvantaged group must be "equitable" represented at all level of company. preferential treatment and numerical goals may be used to achieve this goal, but the use of quotas is not allowed .employers are also required to consult with unions an report to the Department of Labour (DoL) on its progress. Businesses failing to comply with the law are subjects to fines. The EEA requires designated employers to compile and implement an employment equity plan aimed at promoting equal opportunities and affirmative action while eliminating unfair discrimination.

The main purpose of this Act is to provide for employment equity through measures like affirmative action which will redress the imbalance of past. The EEA sets out to achieve equity by promoting the constitution right to equality as well as the exercising of true democracy. These labour laws along with a few others .form the core of the most progressive civil rights and affirmative action policies in SA. Their most striking feature is their apparent invulnerability to the kinds of constitutional itself recognises that in a deeply unequal society, certain forms of fair discrimination will be necessary to establish equality

1.3.6 Constitutional Provisions

1.3.6.1.1 Constitutional Basis for the EEA

The constitution embodies a number of broad fundamental human rights in chapter two which may not be encroached upon by legislative measures introduced by government. the south African constitution establishes a new democratic order based on human dignity, the achievement of equality and the advancement of human right and freedoms chapter two of the bill of right states that.[49] The South African Constitution establishes a new democratic order based on "human dignity, the achievement of equality and the advancement of human rights and freedoms.[50] Chapter Two of the Constitution which is Bill of rights –"This bill of rights is a cornerstone of democracy in South African; it enshrines the rights of all people in the country and aims the democratic values human dignity, equality and freedom."[51] To promote the achievement of equality the constitution allows for the promulgation of legislative and other measure to protect or advance person disadvantage by unfair discrimination.[52] It is this provision on the constitution which gives authenticity to the EEA.

[49] See section of the South African constitution.
[50] Chapter Two of the Bill of right in South African Constitution
[51] Section 7(1) of South African constitution
[52] Section 9(2) of the South African constitution

1.3.6.1.2 Application of the EEA

The purpose of the EEA is to promote the constitutional right of equality to eliminate unfair discrimination in employment to ensure the implementation of employment equity to redress the effects of discrimination and to achieve a diverse workforce broadly representative of our people[53]. It also seeks to promote economic development and efficiency in the workforce. This requirement gives effect to the obligations of the Republic as a member of the International Labour Organisation (ILO).[54]

In fact, according to the Department of Justice website –

> "The purpose of the Act is to achieve equity in the workplace, by a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated group, to ensure their equitable representation in all occupational categories and levels in the workforce."[55]

Looking at the purposes of the EEA, one needs to understand to whom this obligation falls upon. One also needs to look at who must not discriminate and who must not be discriminated against. The following paragraphs look at specific provisions and obligations under the EEA.

1.3.6.1.3 Scope of the EEA

A defining feature of the South African labour market is the disparity in access to and quality of employment. Apartheid education and labour policies produced a strong racial gradient in unemployment, employment and wage rates. The ANC government has been addressing this legacy of disadvantage and injustice through job creation programmes, progressive legislation and legal reform. The Employment Equity Act (1998) is a prime example, obliging employers to implement affirmative action measures to ensure equal representation of designated groups (black people, women and people with disabilities).

However, nearly 12 years since the Act was implemented, there is disappointment, disillusion and frustration about the slow pace of transformation. Criticism also points to a policy that mainly benefits the middle and elite classes while failing to meet the needs of those at the lower end of the income distribution. The recent release of the 10th Commission for Employment Equity report has intensified debate on the successes and shortcomings of affirmative action implementation, particularly the fact that black South Africans are still substantially underrepresented in private sector management structures. In this context, it is important to explore and understand public attitudes toward this policy.

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[53] Chapter 2 of the EEA

[54] Take from the Preamble to the EEA. Also see Charlton and Van Niekerk Affirming Action Beyond 1994

[55] www.justice.gov.za

1.3.6.1.4 The Constitution and Equality

Section 9 (1) guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law as was stated in the case of *The President of RSA and another v Hugo* [56]

The South African constitution is primarily and emphatically an egalitarian constitution the supreme laws of comparable constitutional states may underscore other principal and rights. But in light of our own particular history and vision for the further a constitution was written with equality at its centre equality is our constitution focus and its organising principle. This means that the constitutional commitment to equality emerges directly from the inequality and injustices of the past. The chapter on the history of affirmative action above shows that the policies of segregation and apartheid under white rule saw systematic discrimination, exclusion and dispossession of black people in all aspects of social political and economic life. This is the root of the deep social and economic dispensation that exists in SA today.[57] Section 9 of the constitution detailed equality rights provision encompassing equality before the law and equal protection of the law freedom from unfair discrimination, positive measure to advance equality and the promise of the equal enjoyment of all other rights and freedoms.[58] it establishes a commitment to the transformation of the south African society in particular to the achievement of substance equality.

Jennifer Nedelsky suggest that –

> "The question of equality (to be captured in the constitutional rights) is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we are not equal but vastly different vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights but to how we can structure relations of equality among people with many different inequalities."[59]

To address these inequalities at least two forms of action are required by the constitution firstly; the eradication of barriers and obstacles that unfairly discriminate on the basis of race gender class and other grounds of inequality and secondly the development of positive measure that promote the equality of all groups and enhance the full participation of all person in society the

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[56] The President of RSA and another v Hugo (1997) 4 SA (CC) 1997 (6) BCLR 708

[57] Albertyn C et al (ed) Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 Of 2000 (2001).

[58] Section 9 of the South African Constitution states that –

> Everyone is equal before the law and has the right to equal protection and benefit from the law.
> Equality includes the full equal enjoyment of all rights and freedoms. To promote the Achievement of equality, legislative and other measures designed to protect and advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy and so on.

[59] Nedelsky J Reconceiving Rights as Relationships (1993) at 1.

equality right provides the constitutional framework for this in its protection against unfair discrimination.[60]

1.3.6.1.5 The Constitution and Affirmative Action

The recent release of the 10th Commission for Employment Equity report has intensified debate on the successes and shortcomings of affirmative action implementation, particularly the fact that black South Africans are still substantially underrepresented in private sector management structures. In this context, it is important to explore and understand public attitudes toward this policy.

To give effect to these constitutional rights the EEA was passed.[61] This piece of legislation is the key affirmative action legislation in SA. Although the act was passed in 1998, it only came into effect at the end of 1999.

1.3.6.1.6 Designated Employers

The EEA applies to both the private and public sectors. Chapter II of the EEA applies to all employers,[62] whist Chapter III applies only to designated employers.[63] Designated employers must, in order to achieve employment equity, implement affirmative action measures for the people from designated groups in terms of this Act.[64]

Chapter II states that all employers must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.[65] Chapter III, which contain the affirmative action provisions of the Act, apply only to designated employers.[66] Employers of fifty or more workers or with an annual turnover set out in Schedule 4 of the Act, are required to draw up an employment equity plan which outlines the company's commitment to equity over the next five years.

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[60] In this regard see section 9(3) and (4) of the South African Constitution and the provision for positive measure section 9(2) as stated in note 14 above

[61] All references of the EEA in this reasearch are to The Employment Equity Act 55 of 1998.

[62] See Chapter 1 of the EEA regarding definitions

[63] Ibid

[64] Sec 13(1) of the EEA
Designated groups include – Black people, women, people with disabilities. According to Section 1 of the EEA "Black people" are defined to include Africans, Coloureds and Indians.

[65] See section 5 of the EEA.

[66] Section 12 of Chapter III of the EEA. Further section 1 of the Employment Equity Act states that a designated employer is defined as –"an organ of state as defined in section 239 of the Constitution, but excluding [local spheres of government,] the National Defence Force, the National Intelligence Agency and the South African Secret Service;"

The employment equity plan is to be submitted to the Employment Equity Commission (EEC) on a yearly basis.[67] Further, a collective agreement can also provide that a given employer is a designated employer for the purposes of the Act. The public sector is also covered except for security and defence services.

1.3.6.1.7 The constitutional court's interpretation of affirmative action

In SA, the repeal of discriminatory legislation has created formal conditions for the equality of all South Africans. However, recognising that injustices of the past has led to inequalities and that these inequalities cannot be addressed by treating all persons' equally at all times, the constitution has provided for a substantive approach to equality.

The underlying difficulty in this context has been one proof. Most of the existing case law arose in terms of the prohibition of unfair discrimination, previously contained in the LRA which required the applicant to prove both the existence of a discriminatory act and its unfairness. Various claims of unfair discrimination brought in terms of the LRA have failed for lack of

evidence. Unfair discrimination is particularly difficult to prove and it is for this reason that courts and legislators have grappled with the incident of the burden of proof and establishment structures of proof different from those in the ordinary course in order to ensure that justice is done in discrimination claims. Bearing in mind that the reasons for discrimination fall within the permissible factor in the determination of where the onus should lie in circumstances when the onus is not fixed or certain.

The Constitution provided some assistance to applicants by providing that, where discrimination is shown to have taken place on one of the prohibited grounds, unfairness will be presumed unless the contrary is proven. "Sex," "Pregnancy" and "gender" are all included among the so called listed grounds.

Perhaps the clearest illustration of the problem was provided by the decision of the Labour Appeal Court (LAC) in *Woolworths (Pty) Ltd v whitehead,*[68] where the refusal of an employer to offer more than a temporary position to a well-qualified applicant upon learning of her pregnancy was upheld on the grounds that the applicant had failed to prove that the employer's decision was the result of her pregnancy.

It was left to the EEA to address the problem by providing that whenever unfair discrimination on one of the listed grounds is alleged, "the employer against whom the allegation is made must

[67] A body created by the Act

[68] Woolworths (Pty) Ltd v whitehead 2000 (3) SA 529 (LAC

establish that it is fair."[69] the court held that "whilst the wording of the section is less than clear, the onus placed on the applicant appears to be reduced from having to prove "discrimination" on a balance of probabilities to establishing a set of facts from which an inference of discrimination on one or more of the prohibited grounds can be drawn."[70] This study will now look at the three most important cases and examine how the Constitutional Court (CC) has interpreted and applied the substantive equality right, thereby justifying affirmative action programmes.

1.3.6.2 The Development of the South African Constitutional Equality Jurisprudence

It wasn't until the year 1997 when the full test for equality and the circumstances under which different treatment may constitute unfair discrimination was finally articulated by the CC. in the case of *Harksen v Lane,*[71] the Constitutional Court (CC) laid down the test for determination whether or not a certain act or legislative provisions is unconstitutional for want of compliance with the equality clause

In October 1997, the Court decided on the constitutionality of section 21 of the Insolvency Act 24 of 1936.[72] Jeanette Harksen challenged the sheriff's attachment of her clothes, jewellery and other property as being part of her husband's insolvent estate on two grounds. The first ground was that section 21 violated the right to equality before the law and the right not to be unfairly discriminated against as protected by the Constitution. Secondly, that the attachment infringed on the right not to have ones property expropriated without compensation in terms of section 28(3) of the Constitution. The matter was decided in terms of the interim constitution. When determining the fairness of otherwise of a legislature provision or Act that is challenged on the basis of it being in conflict with the constitutional rights to equality, the CC has adopted three stage approaches-

(i) It will firstly seek to establish discrimination;
(ii) Once discrimination has been established, the unfairness thereof will then have to be established;

[69] Employment equity Act 55 0f 1998
[70] Judge 's commentary on the case (Woolworths (Pty) Ltd v whitehead 2000 (3) SA 529 (LAC))
[71] Harksen v Lane No & Others (1997) 11 BCLR 1489 (CC).
[72] Ibid. in terms of section 21, on the sequestration of an insolvent's estate, temporary ownership of the solvent spouse's assets vests with the Master or the Trustees of the insolvent spouse's estate. In order to have the assets returned, the onus rests on the solvent spouse to prove his/her right to the assets.

(iii) Thirdly, even if the discrimination is found to be unfair, the next step will seek to justify it in terms of the limitations clause.[73]

1.3.6.3 The court's application of affirmative action

In *IMAWU v Greater Louis Trichardt Transitional Local Council*,[74] the post of Town Treasurer was externally advertised by the Respondent. Candidates had to have a relevant Bachelors degree or the equivalent qualification and at least a licentiate membership of the Institute of Municipal Treasurers and Accountants. No appointment was made even though five candidates were short listed. The post was then re-advertised, a short list compiled and candidates subjected to an internal test drafted by the respondent's Town Clerk, who was the previous Town Treasurer. A representative of the institute of Municipal Treasurers and Accountants evaluated both the test itself and the candidates. The test targeted the knowledge and experience of the candidates of local government, their merit and potential ability. After conducting the test, a further short list of three candidates was compiled consisting of Mr Van der Berg, Mr Kruger and Mr Masengana. It was submitted that the respondent did not comply with the provisions of the collective agreement on Equal Employment Practice and Affirmative Action for local government in the selection and appointment of Masengana and it had failed to develop and implement an affirmative action programme. It was further submitted that from Masengana's CV it was clear that he did not possess the necessary experience in local government to qualify for appointment, further that he was appointed simply because he was black, thus ignoring merit and other requirements set out in the collective agreement.

The Court held that affirmative action should not be applied in an arbitrary and unfair manner. In *Minister of Finance v Van Heerden*[75] the Constitutional Court for the first time explicitly dealt with a case in terms of s 9 (2) and set out the "test" for affirmative action. Justice Moseneke (for the majority) affirmed that s 9 (2) should not be seen as creating an exception to the requirements of equality but rather than it merely affirmed that the state had a positive duty sometimes to take corrective steps to ensure the achievement of the goal of equality. It also affirmed that if the Constitutionality of an "affirmative action" or corrective action programme was attacked, the state would be able to win the case if it could show that the programme met the criteria set out in s 9 (2). It would then not be necessary to go to s 9(3) where the state would bear the onus to show that the discrimination was not unfair. It was only when a corrective action programme or policy did not meet the criteria set out in s 9(2) that the court would move on to s 9 (3) to determine whether the discrimination was fair or unfair.

[73] Harksen v Lane and Others (1998) 1 SA 300 (CC) at para 54; (1997) 11 BCLR 1489 (CC) at para 53.
[74] IMAWU v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)
[75] Minister of Finance v Van Heerden

1.4 Aims and objectives of the research

The objective of the dissertation is to determine the laws regulating affirmative action in South Africa and USA. The study will interpret the Employment Equity Act and the USA affirmative action legislations. The study will analyse the affirmative action case laws in both jurisprudence

1.5 Research methodology

The research methodology used in this research is qualitative rather that quantitative. The research is library based and reliance is made on library material such as textbooks, reports, legislation, regulations, publications case laws and articles. An innovative and modern tool used in this study was the internet. The internet was of much help in acating current information on the topic

1.6 Scope and limitation of the study

The study consists five interrelated chapters. Chapter one is the introductory chapter laying down the foundation, while chapter two deals with the legislative and policy framework, chapter three deals with affirmative jurisprudence, while chapter four deals with comparative study between South Africa and USA Finally, chapter five deals with the summary of conclusions drawn from the whole study and make some recommendations.

CHAPTER TWO: A LEGISLATIVE AND POLICY FRAMEWORK

2.1 South African legislative framework

2.1.1 Labour Relations Act 66 of 1995

Looking at the history of discrimination in SA, employees themselves did not fair any better. In fact, some legislative provisions specifically permitted discrimination in the workplace. The commission of Inquiry into Labour Legislation (The Wiehahn Commission), established in the aftermath of the strike wave of the early 1970's, found or recommended that blacks should be allowed to register trade unions and have them recognised as part of the official conciliation process. The Commission further recommended the incorporation of antidiscrimination principles in to South African legislation by stating that the commission cannot avoid the conclusion that in the due course discrimination in the field of labour on the ground of race, colour, sex, political, opinion, religious belief, national extraction or social origin will have to be outlawed and criminalised in south African's labour dispensation.

Legislation incorporating this recommendation was passed in 1979 and resulted in huge growth in African trade unionism in the early 1980s. The LRA contains a number of provisions that specifically prohibits discriminatory treatment of employees and applicants for work. Section 187(1) (f), for example, states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee either directly or indirectly on one or more of a number of non-exhaustive prohibited grounds. The dismissal may however be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee has reached the normal or agreed retirement age for person employed in that capacity.

The purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. It is noteworthy that in the LRA, affirmative action is seen as a means to rectify imbalance in the workplace that resulted from past discrimination.

SA is unique in that it does not deal with the prohibition of unfair discrimination in only one piece of anti-discrimination legislation. It has dealt with this issue in the Employment Equity Act (EEA) and the Promotion of Equality Prevention of unfair Discrimination Act (PEPUDA) as well.

2.1.2 Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000

PEPUDA gives effects to section 9 of the Constitution by providing for

- The equal enjoyment of all right and freedom by every person
- The promotion of equality
- The values of non-racialism and non-sexism as contemplated in sections 9 and 10 of the constitution and
- Promote or propagate hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm, as contemplated in section 16(2) of the constitution.

The purpose of PEPUDA is to prevent and prohibit unfair discrimination harassment and hate speech. People who do not fall within the scope of the Employment Equity Act (EEA) can bring a claim of unfair discrimination under PEPUDA, for example, independent contractors who fall outside the scope of the EEA can be liable or be used under PEPUDA. The legislation does not merely apply in the workplace but also applies to the state and all the individuals living within discrimination.
The scope of legal standing established by PEPUDA is extremely broad so that any person can bring a claim of discrimination to the courts in the public interest, even if they are not directly affected themselves.

Further PEPUDA defines only four acceptable defences against a claim of discrimination, viz., that the discrimination was not of the type specifically ruled out by the law, that it was reasonable and justifiable; that it was part of an affirmative action programme; or that it was justified due to the specific demands of a particular task to adjudicate all the claims PEPUDA has establish with its appointees from the human rights field.
PEPUDA is intended to be key legislative tool to respect, promote and fulfil the equality right. It provides for measure to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment, and to provide remedies for victims of unfair discrimination. It seeks to translate the equality right in to practical rules. In fact, PEPUDA is considerably more explicit than the EEA on the content of the core concepts of discriminatory law, for example, PEPUDA contains a definition of discrimination and harassment. Significantly, PEPUDA is a codification of the courts' jurisprudence on discrimination. Therefore PEPUDA will have to be taken in to account when the EEA is interpreted by the courts

2.1.3 Basic Condition of Employment Act 75 of 1997

The Basic Condition of Employment Act (BCEA) regulates condition in the workplace. The aim of the BCEA is to eradicate unfair labour practices. The purpose of the BCEA is to give effect to the right to fair labour practice referred to in section 23(1) of the constitution; by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligation of the Republic as a member state of the International Labour Organisation (ILO) and to provide for matters connected therewith.

2.1.4 Skills Development Act 97 of 1998

This Act was promulgated by government in 1998, in the mist of high levels of unemployment, low levels of investment in the South African labour, pronounced disparities in income distribution, inequality of opportunity as a result of apartheid and poverty.

The SDA also applies to employment services which assist prescribed categories of person to

- Enter special education and training programme
- Find employment
- Start income generating projects and
- Participate in special employment programmes

The prescribed categories are, *inter alia*, women.

2.1.5 Employment Equity Act 55 of 1998

Employment Equity Act (EEA) seeks to ensure that people of SA enjoy equality of opportunities in employment that were denied to them by apartheid system. This sweeping law direct all employers, public and private, to eliminate unfair discrimination in the workplace and requires businesses with fifty or more employees and or annual revenues exceeding certain threshold levels to implement affirmative action programmes aimed at blacks, women and the disabled. The employers who do not comply with EEA creates an impact directly on recruitment practices and the composition of the workforce.

The Employment Equity Act (EEA) goes further and mandate that "suitably qualified members of the disadvantaged group must be equitable represented at all level of company."[76] Preferential treatment and numerical goals may be used to achieve this goal, but the use of quotas is not allowed. Employers are also required to consult with unions, report to the Department of Labour

[76] Summary of the Employment Equity Act, 55 of 1998, issued in terms of Section 25(1) South African Constitution Act 108 of 1995

(DoL) on its progress. Businesses failing to comply with the law are subject to fines .The EEA requires designated employers to compile and implement an employment equity plan, aimed at promoting equal opportunities and affirmative action, while eliminating unfair discrimination.

2.1.6 Constitutional Provisions

The constitution embodies a number of broad fundamental human rights in chapter two which may not be encroached upon by legislative measures introduced by government. The South African constitution establishes a new democratic order based on human dignity, the achievement of equality and the advancement of human right and freedom. Chapter two section seven sub section one of the Bill of Rights states that the South African Constitution establishes a new democratic order based on "human dignity, the achievement of equality and the advancement of human rights and freedom. The same section states that –"This Bill of Rights is a cornerstone of democracy in South Africa; it enshrines the rights of all people in the country and aims the democratic values human dignity equality and freedom."To promote the achievement of equality the constitution allows for the promulgation of legislative and other measure to protect or advance person disadvantage by unfair discrimination.[77] It is this provision on the constitution which gives authenticity to the EEA.

2.1.7 The Constitution and Equality

Section 9 (1) of the constitution guarantees that everyone is equal before the law and has the right to equal protection and benefits of the law. Reference is given to the case of the *President of RSA and Another v Hugo* the court states that

> "To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[78]

This means that the constitutional commitment to equality emerges directly from the inequality and injustices of the past. The chapter on the history of affirmative action above shows that the policies of segregation and apartheid under white rule saw systematic discrimination, exclusion and dispossession of black people in all aspects of social, political and economic life. This is the root of the deep social and economic dispensation that exists in SA today. Section 9 of the Bill of Rights is a detailed equality rights provision, encompassing equality before the law and equal protection of the law, freedom from unfair discrimination, positive measure to advance equality and the promise of the equal enjoyment of all other rights and freedoms. It establishes a

[77] Section 9 (2) of the Constitution 1993
[78] Nedelsky J Reconcerniving Rights as Relationships (1993) at 1.

commitment to the transformation of the South African society, in particular, to the achievement of substance equality.
Jennifer Nedelsky suggest that –

> The question of equality (to be captured in the constitutional rights) is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we are not equal but vastly different vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights but to how we can structure relations of equality among people with many different inequalities.[79]

To address these inequalities at least two forms of action are required by the constitution, firstly; the eradication of barriers and obstacles that unfairly discriminate on the basis of race, gender, class and other grounds of inequality, and secondly, the development of positive measure that promote the equality of all groups and enhance the full participation of all person in society. The equality right provides the constitutional framework for this, in its protection against unfair discrimination.

2.1.8 The Constitution and Affirmative Action

The South African constitution makes provision for affirmative action measures. Section 9(2) of the constitution states that –

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

To give effect to these constitutional rights the EEA was passed. This piece of legislation is the key affirmative action legislation in SA. Although the Act was passed in 1998, it only came into effect at the end of 1999.

2.2 United sates of America legislative framework

Affirmative action remains a focal point of public debate as the result of legal and political developments at the federal, state, and local levels. In recent years, federal courts have reviewed minority admissions programs to state universities in Texas, Georgia, Michigan, and Washington, questioning in general the constitutional status of racial and ethnic diversity policies in public education; ruled on minority preferences in public and private employment as a remedy for violation of civil and constitutional rights; invalidated a Federal Communications Commission policy requiring radio licenses to adopt affirmative minority recruitment and

[79] Section 9 (2) of the 1996 Constitution

outreach measures; and considered state and local efforts to increase minority group participation as contractors and subcontractors on publicly financed construction projects. Ongoing legal controversy surrounds the Supreme Court's 1995 ruling in *Adarand Constructors Inc.v. Pena*, setting constitutional standards for race-based affirmative action by the federal government. This report will be updated as necessary. The origins of affirmative action law may be traced to the early 1960's as first, the Warren, and then the Burger Court, grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[80] These holdings ushered in a two decade era of "massive" desegregation – first in the South, and later the urban North – marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees later sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations

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2.1.2 Congressional Research Service, The Library of Congress

CRS-2 complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable. Following the Court's lead, Congress and the Executive approved a panoply of laws and regulations authorizing, either directly or by judicial or administrative interpretation, "race-conscious" strategies to promote minority opportunity in jobs, education, and governmental contracting. The basic statutory framework for affirmative action in employment and education derives from the Civil Rights Act.[81] Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act.

The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate," *Dowell v. Board of Education*,[82] See also *Freeman v. Pitts*, [83] (allowing incremental dissolution of judicial control) and *Missouri v Jenkins*,[84] (directing district court on remand to "bear in mind that its end purpose

[80] Green v. County Board, 391 U.S. 430 (1968); Swann v. Board of Education, 402 U.S.1 (1971); Keyes v. Denver School District, 413 U.S. 189 (1973).

[81] Civil Rights Act of 1964.

[82] Dowell v. Board of Education, 498 U.S. 237 (1991)

[83] Freeman v. Pitts, 503 U.S. 467(1993)

[84] Missouri v. Jenkins, 515 U.S. 70 (1995)

is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'"). See also 34 C.F.R. § 100.3(b)(vii)(6)(ii) (2004)("Even in the absence of past discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."). 59 Fed. Reg. 8756 (Feb. 23, 1994). to make discrimination victims whole. Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. Official approval of "affirmative action" remedies was further codified by federal regulations construing the 1964 Act's Title VI, which prohibits racial or ethnic discrimination in all federally assisted "programs" and activities, including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage "voluntary affirmative action to attain a diverse student body."

Another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid if the aid is necessary to overcome effects of past institutional discrimination. Since the early 1960s, minority participation "goals" have also been integral to Executive Branch enforcement of minority hiring and employment standards on federally financed construction projects and in connection with other large federal contracts.
Executive Order 11246, as presently administered by the Office of Federal Contract Compliance Programs, requires that all employers with 50 or more employees, and federal contracts in excess of $50,000, file written affirmative action plans with the government. These must include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts. Race and gender considerations – which may include numerical goals – are also a fundamental aspect of affirmative action planning by federal departments and agencies to eliminate minority and female "underrepresentation" at various levels of agency employment.
42 U.S.C. § 2000e-16(b)(1); 5 U.S.C. § 7201. The EEOC and the Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. § 720.205(b).

See CRS Report RL32565, the "Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005" carried forward prior longstanding USDOT policy mandating a 10% SDB set-side

"[e]xcept to the extent the Secretary of Transportation determines" otherwise. For furtherinformation, see CRS Report[85] Federal contract "set-asides" and minority subcontracting goals evolved from Small Business Administration programs to foster participation by "socially and economically disadvantaged" entrepreneurs (SDBs) in the federal procurement process. Minority group members and women are presumed to be socially and economically disadvantaged under the Small Business Act, while non-minority contractors must present evidence to prove their eligibility. "Goals" or "set-asides" for minority groups, women, and other "disadvantaged" individuals have also been routinely included in federal funding measures for education, defense, transportation and other activities over much of the last two decades. Currently, each federal department and agency must contribute to achieving a government-wide, annual procurement goal of at least 5% with its own goaloriented effort to create "maximum practicable opportunity" for minority and female contractors.

Federal Acquisition Act amendments enacted in 1994 permit federal agency heads to adopt restricted competition and a 10% "price evaluation preference" in favour of "socially and economically disadvantaged individuals" to achieve the government-wide and agency contracting goal requirements. And, as signed by President Bush on August 10, 2005, §1101 of P.L. 109-59 reauthorized a 10% set-aside of funds for small disadvantaged firms on federal highway and surface transportation projects through the end of FY2009.

By the mid-1980's, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII. These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree. Local 28 Sheet *Metal Workers v. EEOC,*[86] *Wygant v. Jackson Board of Education,* [87] *United States v. Paradise*[88]; *Johnson v. Transportation Agency,*[89]. For additional information, see CRS Report[90]

[85] RL30470, *Affirmative Action Revisited: A Legal History and Prospectus*, pp. 8-22.

[86] Local 28 Sheet Metal Workers v. EEOC,[86] 478 U.S. 421 (1986)

[87] Wygant v. Jackson Board of Education, [87]476 U.S. 267 (1986)

[88] United States v. Paradise[88], 480 U.S. 149 (1987)

[89] Johnson v. Transportation Agency,[89] 480 U.S.616 (1987)

[90] CRS Report[90] RL30470, *Affirmative Action Revisited,*

2.1.3 A Legal History and Prospectus.

Regents of the University of California v. Bakke[91] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by a "manifest imbalance" – or "historic," "persistent," and "egregious" underrepresentation – of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass legal or constitutional muster if they displaced more senior white workers. But the consideration of race or gender as a "plus" factor in employment decisions, when it did not unduly hinder or "trammel" the "legitimate expectations" of non-minority employees, won ready judicial acceptance. Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and "narrowly tailored" to avoid becoming rigid "quotas." The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action.
A "notable lack of unanimity" was evident from the six separate opinions filed in that case. One four-Justice plurality in *Bakke* voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school which set aside sixteen of one hundred positions in each incoming class for minority students, where the institution itself was not shown to have discriminated in the past.

Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds while endorsing the nonexclusive consideration of race as an admissions criteria to foster student diversity. In Justice Powell's view, neither the state's asserted interest in remedying "societal discrimination," nor of providing "role models" for minority students was sufficiently "compelling" to warrant the use of a "suspect" racial classification in the admission process. But the attainment of a "diverse student body" was, for Justice Powell, "clearly a permissible goal for an institution of higher education" since diversity of minority viewpoints furthered "academic freedom," a "special concern of the First Amendment." Accordingly, race could be considered by a university as a "plus" or "one element of a range of factors"– even if it "tipped the scale" among qualified applicants – as long as it "did not insulate the individual from comparison with all the other candidates for the16

[91] Regents of the University of California v. Bakke 438 U.S. 265 (1975). Id. at 311-12.

The "quota" in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting Bakke but reversed the judicial ban on consideration of race in admissions. The Powell opinion in Bakke may help to explain the discrepant results reached by the Court in the Michigan Law School and undergraduate admissions cases. In *Grutter v. Bollinger*,[92] a 5 to 4 majority of the Justices, led by Justice O'Connor, held that the University's Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students. But in *Gratz v. Bollinger*,[93] six Justices decided that the University's undergraduate policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional muster. The law school program passed muster because it was based on an individualized, holistic review of each applicant's file, in contrast to the undergraduate program, which "[did] not provide for a meaningful individualized review of applicants"
but instead "assign[ed] every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant." In effect, *Grutter* enshrined in law the Powell diversity rationale – embraced by no other Justice in *Bakke* – that the state has a "compelling" interest in promoting racial diversity in higher education. In another series of decisions, the Court approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects, *Fullilove v. Klutznick*,[94] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs, *City of Richmond v. J.A. Croson Co.*[95]
Contextual differences in the particular kind of governmental activity being challenged frequently account for variations in judicial approach to affirmative action in public employment, government contracting, admission to public institutions of higher education, and election redistricting. Almost uniformly, however, the law has been marked by a failure of consensus on most issues, with bare majorities, pluralities, or–as in *Bakke*–a single Justice, determining the "law" of the case. Not until 1989 did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other "benign" legislative purpose. Disputes prior to the *City of Richmond* case yielded divergent views as to whether state affirmative action measures for the benefit of racial See, e.g., Shaw v. Reno, 509 U.S. 630, 642 (5-4 decision held racial gerrymandering to create majority-African-American district may violate the equal protection clause).

[92] Grutter v. Bollinger 539 U.S. 506 (2003).
[93] Gratz v. Bollinger 539 U.S. 244 (2003).
[94] Fullilove v. Klutznick, Id. at 276-77 (O'Connor. J., concurring).
[95] City of Richmond v. J.A. Croson Co 448 U.S. 448 (1980).

Minorities were subject to the same "strict scrutiny" as applied to "invidious" racial discrimination under the Equal Protection Clause, an "intermediate" standard resembling the test for gender-based classifications, or simple rationality. In *City of Richmond*, a 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not "narrowly tailored" to a "compelling" governmental interest. While "race-conscious" remedies could be legislated in response to proven past discrimination by the affected governmental entities, "racial balancing" untailored to "specific" and "identified" evidence of minority exclusion was impermissible. *City of Richmond* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial linedrawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC,*[96] the Court upheld certain preferences for minorities in broadcast licensing proceedings, approved by Congress not as a remedy for past discrimination but to promote the "important" governmental interest in "broadcast diversity." This two-tiered approach to equal protection analysis of governmental affirmative action was short-lived, however. In *Adarand Constructors, Inc. v. Pena,*[97] the Court applied "strict scrutiny" to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by "socially and economically disadvantaged individuals," defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all "racial classifications" by government at any level must be justified by a "compelling governmental interest" and "narrowly tailored" to that end. But the majority opinion, by Justice O'Connor, sought to "dispel the notion" that "strict scrutiny is 'strict in theory, but fatal in fact,'" by acknowledging a role for Congress as architect of remedies for discrimination nationwide.

"The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." No further guidance is provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort, which must be adequately justified and narrowly drawn to pass constitutional muster. Adarand last returned to the High Court for a third appearance in 2001, but the Justices sidestepped the constitutional issues posed and dismissed the appeal as "improvidently granted."

[96] *Metro Broadcasting, Inc. v. FCC* 497 U.S. 547 (1990).
[97] *Adarand Constructors, Inc. v. Pena* 515 U.S. 200 (1995).

CHAPTER THREE: AFFIRMATIVE ACTION JURISPRUDENCE

3.1 The impact of the affirmative action in the United States (US).

3.1.1 Arguments in favour of affirmative action

President Kennedy stated in Executive Order 10925 that "discrimination because of race, colour, or national origin is contrary to the Constitutional principles and policies of the United States"; that "it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, colour, or national origin, employed or seeking employment with the Federal Government and on government contracts"; that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government"; and that "it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower". Some individual American states also have orders that prohibit discrimination and outline affirmative action requirements with regard to race, colour, religion, sexual orientation, national origin, gender, age, and disability status.[98]

Proponents of affirmative action argue that by nature the system is not only race based, but also class and gender based. To eliminate two of its key components would undermine the purpose of the entire system. The African American Policy Forum (AAPF) beliefs that the class argument is based on the idea that non-poor minorities do not experience racial and gender based discrimination. The AAPF beliefs that "Race-conscious affirmative action remains necessary to address race-based obstacles that blocks the path to success of countless people of colours for all classes".[99] The groups goes on to say that affirmative action is responsible for creating the African American middle class, so it does not make sense to say that the system only benefits the middle and upper classes.

3.1.2 Arguments against affirmative action

Affirmative action has been the subject of numerous court cases, where it is often contested on constitutional grounds. Some states specifically prohibit affirmative action, such as California

[98] The President's executive order 10925

[99] The Policy Forum is a think tank and information clearinghouse designed both to highlight the centrality of gender in the political debates within the Black community and to illuminate the patterns of institutional discrimination that continue to persist in contemporary American society.

(Proposition 209), Washington (Initiative 200), Michigan (Michigan Civil Rights Initiative) and Nebraska (Nebraska Civil Rights Initiative).[100]

3.1.3 Class inequality

The controversy surrounding affirmative action's effectiveness is based on the idea of class inequality. Opponents of racial affirmative action argue that the program actually benefits middle- and upper-class African American and Hispanic American at the expense of lower class European American and Asian American. This argument supports the idea of solely class-based affirmative action. America's poor is disproportionately made up of people of colour, so class-based affirmative action would disproportionately help people of colour. This would eliminate the need for race-based affirmative action as well as reducing any disproportionate benefits for middle and upper class people of colour. In 1976, a group of Italian-American professors at City University of New York asked to be added as an affirmative action category for promotion and hiring.

A 2005 study by Princeton sociologists Thomas J. Espenshade and Chang Y. Chung compared the effects of affirmative action on racial and special groups at three highly selective private research universities. The data from the study represent admissions disadvantage and advantage in terms of SAT (Standardized Test)[101] points (on the old 1600-point scale):

- Blacks: *Plus or minus* 230
- Hispanics: *Plus or minus* 185
- Asians: *Plus or minus* 50
- Recruited athletes: *Plus or minus* 200
- Legacies (children of alumni): *Plus or minus* 160

In 2009, Princeton sociologist Thomas Espenshade and researcher Alexandria Walton Radford, in their book 'No Longer Separate, Not Yet Equal', examined data on students applying to college in 1997 and calculated that Asian-Americans needed nearly perfect SAT scores of 1550 to have the same chance of being accepted at a top private university as whites who scored 1410 and African-Americans who got 1100.[102] Whites were three times, Hispanics six times, and blacks more than 15 times as likely to be accepted at a US university as Asian-Americans. These

[100] The Michigan Civil Rights Initiative 2008 and Nebraska Civil Rights Initiative 2009 P. 124

[101] The SAT is a standardized test for college admissions in the United States. The SAT is owned, published, and developed by the College Board, a nonprofit organization in the United States

[102] Affirmative statistics made by both Prof T J Espenshade and C Y Chung, both from faculty of sociology at university of Washington. Journal, Sociology of Education October 2005, 78: Pages 269-293,

results were after controlling for grades, scores, family background (legacy status) and athletic status (whether or not the student was a recruited athlete).

3.2 The impact of the affirmative action in South Africa.

The year 2009 marked 10 years since South Africa's affirmative action (AA) legislation of 1998 took effect. It is thus opportune to take stock, not only of the institutional and legislative context of affirmative action, but also of the impact that it has had over time. It is not the purpose of this study to revisit the rationale for or antecedents of affirmative action in South Africa. These aspects are well-documented elsewhere (see, for example, Seekings and Nattrass 2005; Thomas 2002; Kennedy-Dubourdieu 2006; Rabe 2001; and Black *et al.* 2009).[103] Our aim is to assess empirically the impact of affirmative action on labour market outcomes. It is, of course, still useful to locate such an analysis in the proper context. Much of the liberation struggle in South Africa was focussed on ending the discrimination against and exclusion of the majority of South Africans from many spheres of life, including the economy. It was therefore to be expected that attempts to reverse the legacy of such discrimination would be on the agenda of a democratically elected government. [104]

Second on the list of African National Congress (ANC) policy objectives adopted at their National Conference in May 1992 was the question of addressing inequality: "to overcome the legacy of inequality and injustice created by colonialism and apartheid in a swift, progressive and principled way". The new South African Constitution (Republic of South Africa Act)[105] duly made provision for policy and legislation to be formulated to allow efforts to redress the inequalities of the past.[106] This provision is an exception to the Constitution's otherwise staunch commitment to equality. Even before the establishment of any formal affirmative action or empowerment strategies, some voluntary redress initiatives were undertaken in the private sector.

The Presidential Labour Market Commission was established upon an Act passed by Parliament on September 14, 1995, with terms of reference which included, *inter alia*, the proposal of mechanisms to redress discrimination in the labour market. In particular, the Commission considered "a policy framework for Affirmative Action in employment with due regard to the objectives of employment creation, fair remuneration, productivity enhancement and

[103] Available at http://www.info.gov.za/speeches/1994/230994009.htm

[104] Centre for Research on Inequality Human Security Ethnicity Working Paper No. 76

[105] Act 108 of 1996

[106] The African National Congress, now the ruling party in South Africa.

macroeconomic stability" as stated in their report, entitled Restructuring the South African Labour Market (Labour Market Commission 1996: xiv).[107]

3.2.1 The institutional and legislative setting for affirmative action policies in South Africa

3.2.1.1 The first formalisation of affirmative action: the Employment Equity Act (Act 55 of 1998)

The aims of the EE Act

The Employment Equity Act aims for equality by imposing the duty to

(i) Eliminate unfair discrimination (i.e. in current employment and remuneration practices) and
(ii) take positive or affirmative measures to attract, develop and retain individuals from previously disadvantaged groups. These groups are designated in the Act as "Blacks (including African, Coloured (mixed race) and Indians), women and people with Disabilities." The concept of affirmative action thus envisages that remedial action taken, while the first duty requires cessation of discriminating practices that led to the inequalities in the first place. The notion of equity in the Act is so often misunderstood that it is worth quoting at length to convey the government's intentions clearly: "equality can involve a formal notion of treating everyone who is in a similar position the same. This can perpetuate unfairness when those who hold similar positions, e.g. all senior managers, have different needs and circumstances that impact on their ability to perform effectively.[108]

The Constitution requires employers to move beyond formal equality to substantive equality by acknowledging the differences between. This Green Paper[109] formed the basis for the affirmative action legislation contained in the Employment Equity Act of 1998 (as amended). The core elements of the Green Paper were included in the Act. To further strengthen the legislative framework in pursuit of this objective, government promulgated the Promotion of Equality and the Prevention of Unfair Discrimination Act.[110] Employees treat them differently on the basis of

[107] Report of the Presidential Commission to Investigate Labour Market Policy in June 1996
[108] Purpose of the Act (Employment Equity Act 55 of 1998) Ch 1 Sec 2
[109] Volume 3,No2 Green paper on the conceptual framework for affirmative action management of diversity in the public sector
[110] Centre for Research on Inequality Human Security Ethnicity Working Paper No. 76 By Rulof Burger and Rachel Jafta March 2010 (Act 4 of 2000)

these differences. This is necessary to ensure that all employees are treated fairly. Equity therefore invokes the requirement of 'fair' treatment in order to achieve substantive equality as an outcome in the workplace. Equal treatment and equal opportunity, like equality, subjects everyone to the same rules without distinction. Equity requires changing the rules so that their application is fair. (Republic of South Africa 2009: 7; emphasis added)

3.2.1.2 Employment equity in a comprehensive Broad-based Black Economic Empowerment (BEE) strategy

In March 2003 the Department of Trade and Industry (DTI) published its draft 'broad based black economic empowerment' policy document, outlining the concept of a scorecard to measure empowerment progress. [111] In January 7 2004 the Broad-based Black Economic Empowerment Act 53 of 2003 was assented to. This Act has as its purpose the "economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas." The Act requires that the Minister of Trade and Industry develop and publish Codes of Good Practice, aimed at setting guidelines for the process of BEE in the whole economy.
To measure compliance with BEE requirements, the Department of Trade and Industry uses a balanced scorecard, consisting of three broad components. The scorecard will be used for government procurement, public-private partnerships, sale of state-owned enterprises, when licenses are applied for, and for any other relevant economic activity.[112] That is, for any of these dealings with government, a company's BEE status will be taken into account. Note that in this Act, White women, who are included in the Employment Equity Act as previously disadvantaged on gender basis, are now excluded.

For about twenty months after the release of the comprehensive BEE strategy, business, labour and the government held meetings at Nedlac7 discussing what should or should not count for points, what the weightings should be for the different categories, and many other aspects of the scorecard. This occurred in the absence of the Codes. At the same time, sectoral BEE charters were developed for particular sections of the economy, e.g. mining, the financial sector, agriculture, tourism and the information and communications technology sector. Towards the end of December 2006, the Department of Trade and Industry finally launched the finalised Codes of Good Practice, which were then approved by Cabinet. The Codes were published in the Government Gazette on February 9 2007.

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[111] www.dti.gov.za - Under legislations and regulations

[112] Working papers 04/06 by Rulof Burger & Rachel Jafta; Department of Economics, University of Stellenbosc Tucker 2003:1

CHAPTER FOUR: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND UNITED STATES OF AMERICA (USA)

4. An overview

A comparative analysis of the political, legal and constitutional systems of another country is very relevant. It helps to promote a better understanding of our own country's situation, and assists in a proper evaluation of one's own institutions. It also assists in the interpretation of constitutions and helps to enforce human rights.[113] Further, whenever there is a controversial topic like affirmative action which poses a great deal of difficulty, such a problem can be solved with the help of a comparative study. This comparative study will also be useful in that the experience of the US may be helpful in informing SA of the future and long term consequences of affirmative action. Therefore it is to make a comparative study of the relevant constitutional provisions relating to equal opportunity in these two countries.

Affirmative action has been both praised and denounced, as an answer to racial inequality. One of the key issues that arise when affirmative action is discussed is whether or not affirmative action in fact promotes equality and atones for past prejudices. Another concerned is whether the current affirmative action policy is the right policy to use. The issue surrounding affirmative action seems to be universal as are the circumstances perhaps the most widespread similarity among the programmes in these very different countries has been that group preference and quotes are always discussed. The debate on affirmative action exist because apartheid was very divisive issue and it affected different group of people in different ways, and some groups or persons seemingly benefit more from affirmative action than other persons or groups. In addition, it causes people to be classified into groups, and affirmative action breaks down group barriers it is an issue that is difficult to resolve because people have different ideas about how problems of racial inequality and historical discrimination should be addressed.

4.1 The application of affirmative action in the United States of America

Acknowledging that the term "affirmative action" is a highly debatable and volatile concept in the United States and other countries, the basic notion of what affirmative action means in the US, is simplified in this chapter to give the reader an understanding of the common factors attached to this term in this and other countries.

The problem is that even though Executive Order (EO) 11246[114] specifies that affirmative action is one of the conditions of agreeing to do work for the government, it does not define affirmative

[113] This information originally appeared as an article in the Brookings Review (2000) Winter V (18) No 1 and ia draw from Cardozo Lecture given by Justice Ginsburg at the association of the Bar in City of New York in Feb 1999

[114] Since 1965, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has

action. This lack of a definition in the US leaves affirmative action initiatives very vulnerable, as will be seen in the next part to this study. Even though the statutes in the US are silent on the definition of affirmative action, the Office of Federal Contract Compliance Programme (OFCCP)'s[115] manual does give a definition of affirmative action programmes. According to the manual, affirmative action consists of those results oriented actions which a contractor by virtue of its contracts must take to ensure equal employment opportunity. Where appropriate, it includes goals to correct underutilisation, correction of problem area, etc. It may also include relief such as back pay, retroactive seniority, make-up goals and timetables, etc. In the US, where affirmative action has had a longer spell of implementation, Brown and Connerly states that; [116]

> "As a general rule affirmative action consists of three components measures aimed at eliminating discrimination in hiring, promotions and terminations; programs to increase the representation of women and minorities in government employment and contracting; and policies for special admissions to institutions of higher learning, which are always the gateways to the nation's best jobs."

The term "affirmative action", in the US, encompasses a broad spectrum of measures and initiatives which are utilised to overcome the effects of past or present policies, practices or other barriers to equal opportunity. These initiatives are very much like the initiatives adopted by SA and India, and include training programmes, recruitment, voluntary affirmative action measures, changes in promotion and retrenchment procedures, and also includes the elimination of adverse impact relative to an employer's selection criteria. Unlike SA, but very much like the practices in India, the US provides for a quota system.

Goldman argues that there are two goals that are attached to the practices of affirmative action in the United States. These have been characterised as forward and backward looking goals. Forward-looking goals focuses on the promotion of equality of opportunity by relief from discrimination and the meeting of needs, whilst backward-looking goals emphasises the remedial nature of the practices as a means of compensating persons for past harm and injustices resulting from negative discrimination.

The aim of compensatory justice is to provide counter balancing benefits to those individuals who have been wrongfully injured in the past so that they could be brought up to the level of wealth and welfare that they would now have had if they had not been disadvantages. Thus, compensatory programmes differ from redistributive programmes mainly in regard to their concern with the past. Redistribution is concerned with eliminating present inequalities while

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been committed to ensuring that Government contractors comply with the equal employment opportunity (EEO) and the affirmative action provisions of their contracts.

115 The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces the Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973

116 Connerly W Choosing Sides (1995) Black Enterprise V (26) No.4 156-157 at 156

compensatory justice is concerned not only with this, but also with providing compensation for unfair burdens imposed in the past. Considerations of compensatory justice can justify a person getting more in the present than he would unless his past losses are considered. Edwards[117] has identified five broad aims for affirmative action programmes in the US; compensation, equality of opportunity as an end in itself and as a means to other ends, diversity and racial equality or justice. Affirmative action goals in the US are similar to affirmative action goals in SA. It is seen as a means of achieving equality. Where equality of opportunity is seen as a means of compensation for past harms it will generally be seen as an end in itself. When affirmative action is used to meet needs, it is generally seen as contributing to greater equality of opportunity or as an end in itself.

Affirmative action in the US is further defined as an outreach programme intended to broaden the pool of eligible or qualified individuals to include more members of specific groups; targeted or compensatory training to upgrade the qualifications of individuals in these groups; goals and timetables to measure progress; preferences; set-asides; and (sometimes) actual quotas. Affirmative action programmes have arisen as a result of executive orders, legislation, consent decrees, stemming from government investigations, court-ordered remedies, and voluntary action by corporations and other non-public institutions. The distinction between government-mandated and voluntary programmes is important. For the most part, court decisions restricting public programmes on constitutional groups, do not directly affect voluntary programmes in the private sector.

Looking at the historical background to affirmative action in the United States, the basis behind affirmative action is that because of past discrimination and oppression, such as the unequal treatment of women, and the enslavement of African Americans, minorities and women have difficulty competing with their white male counterparts. Affirmative action therefore is a term, which refers to a variety of efforts used by employers and educational institutions to overcome past and continuing discrimination in order to allow qualified women and minorities to compete equally for jobs, education, and promotional opportunities.

4.1.1 Legislation governing affirmative action in the United States (US)

4.1.1.1 Civil Rights Act 1991

This statute reaffirms and tightens prohibition of discrimination, permits individuals to sue for punitive damages in cases of intentional discrimination and shifts the burden of proof to the

[117] Edward Jones, Jr (1992, P.155) has criticized the corporate retreat from affirmative Action Nevertheless, diversity management has a place in human resource management

employer.[118] Several decades ago politicians and general public were debating the merits of the Vietman war, It is now left to court and litigation engage in the mopping up operations to determine what this new law really mean.

4.1.1.2 Occupational Safety and Health Act 1970

This Act establishes mandatory safety and health standards in organisations to ensure that all employees are protected within the working environment.[119] Since the passage of the Occupational Safety and Health Act of 1070, there has been a steady decline in the injury rate for manufactory works. This has been widely cited as evidence of the effectiveness of the regulatory activities of this Occupational Safety and Health Act.

4.1.1.3 Immigration Reform and Control Act 1986

This one prohibits employers from knowingly hiring illegal aliens and prohibits employment on the basis of national origin of citizenship[120] There are those in this nation who would use the Immigration Reform and Control Act as a pretext to deny employment to United States citizens and aliens. The other legislations which were also put in place was Equal pay Act[121]specifically ton prohibits pay differences based on sex for equal work, and Mandatory Reform and control Act [122] to prohibit the forced retirement of most employees before the age of seventy.

4.1.2 The executive approach to the application of affirmative action

4.1.2.1 Executive Orders

Overview

These are executive orders laid down by the executive as part of legislation; members of the executive submitted their views and were assessed and passed by parliament.

(i) President Theodore Roosevelt (1901-1923)

President Theodore Roosevelt took the view that the President as a "steward of the people" should take whatever action necessary for the public good, unless expressly forbidden by law or

[118] Civil Rights Act 1991- Ch1

[119] Occupational Safety and Health Act 1970

[120] Immigration Reform and control Act 1986 P 603

[121] Equal Pay Act of 1963 as it appears in volume 29 of the United States Code, at section 206(d).

[122] Mandatory Retirement Act 1978

the Constitution.[123] In 1912 Roosevelt's Progressive Party refused to seat southern black delegates.[124] The demise of the Progressive movement during World War one (WW1) and the Republican ascendancy of 1921 offered little relief to African Americans.

(ii) Warren G Harding (1921-1923)

Warren Harding, who won the vote of the American people in 1920, he opposed the theory of economic and political discussion, but not social segregation, and made significant efforts to implement these views.[125]When he assumed office in 1921 the Harding administration found itself confronted with the problem of arranging the withdrawal of American troops from the Dominican Republic, terminating the American presence in that country was part of the administration's policy.

Apart from the Great Migration which relocated millions of blacks from the South to the North, the final element responsible for the re-channelling of the African American political activity was the Depression itself.[126] The very extent of black unemployment was one of the reasons that blacks received some benefit from the New Deal Programmes, even if this was not a major objective of Roosevelt's administration.[127] The new deal, especially in its initial phases, achieved few civil rights successors. The most significant civil rights progress occurred within the Department of Interior. It was here that the first federal "affirmative action" programme, although it was never used for African Americans, was developed in conjunction with the Public Works Administration (PWA). The programme was designed especially for the sectors of the economy in which African American labour was already concentrated. Job training and upgrading of skills were not part of this programme and therefore was not very successful.

(iii) Executive Orders 9980 and 9981

Despite mounted pressure for a national Fair Employment Practice Commission (FEPC) law during the Truman and Eisenhower years, both administrations resorted to executive orders to solve issues of civil rights. Truman's first concrete act regarding equal employment opportunity was his issuing of Executive Order (EO) 9980 on July 26, 1948. Truman's Order created a Fair Employment Board within the Civil Service Commission, to ensure "fair employment throughout the Federal establishment, without discrimination because of race, colour, religion or

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123 Kane Joseph Nathan et al Facts About the Presidents (2001) 7ed.

124 See Murray K Robert The Harding Era – Warren G Harding and His Adminstration (1969).

125 Unemployement among urban blacks exceeded fifty percent.

126 See the book by Leuchtenberg E William Franklin D Roosevelt and the New Deal (1963). Chapter 1

127 Created in 1933 by Title II of the National Industrial Act, the PWA was designed to relieve unemployement through massive construction projects for housing, schools and other public buildings, but was not as radical as it appeared..

national origin".[128] That same day, Truman issued EO 9981, which outlawed segregation in the armed forces.[129] This board could investigate charges of discrimination and suggest remedies, but it had no enforcement powers. A second executive order of December 3, 1951, created the Committee on Government Contract Compliance, to determine whether government contractors were observing policies of non-discrimination. Truman's orders expired when he left office in January 1953.

(iv) Executive Order 10479

Succeeding Truman was Dwight Eisenhower, who issued EO 10479. This order created the President's Committee on Government Contracts (PCGC) to "receive complaints of alleged violations of non-discrimination to provisions of government contracts".[130] However, like Roosevelt's FEPC, the PCGC lacked enforcement powers and was not as effective as promised.

(v) President J F Kennedy and Executive Order 10952

The term "affirmative action" actual emerged first in labour law in the 1935 National Labour Relations Act (Wagner Act 1935).[131] The Wagner Act did not become firmly associated with Civil Rights Legislation enforcement until 1961 in President Kennedy's Executive Order 10952. The term "affirmative action" was first utilised in public policy in this order. In March 1961 the Employment Opportunity (EO) 10952 created the EEDC,[132] which required federal contractors to take affirmative action to ensure that race, creed, colour or national origin did not play a part in their treatment of job applicants or employees.[133] Departing from previous presidential directives, this Order granted Equaliy Employment Opportunity Commission (EEOC) authority to impose sanctions for violations of the (EO).

4.2 The application of affirmative action in South Africa.

To understand a country's present situation there is a need to look at that country's history since much of what has happened in the past forms the basis for action taken in the present. SA as point out above, was a country that was ruled under a political system called apartheid. Apartheid was based on the policy of segregation of races through legislation. Racial

[128] Congressional Digest Civil Rights and FEPC (March 1964) V (43).

[129] The order requires that there be "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion and national origin".

[130] Judicial Deradicolization of the Wagner and origins of modern legal consciouness

[131] Hubbard W Gary Affirmative Action , The Law and Politics of Equality (1978) at 109 (Hubbard).

[132] The EOC mandates that projects which are financed with federal funds "take affirmative action" to ensure that hiring and employement practices are free from racial bias.

[133] West's Encyclopedia of American Law (1988) V (9) (Encyclopedia of American Law).

discrimination was one of the defining features of apartheid in South Africa and had been entrenched in a range of statutory provisions for many decades. This is important as a successive government of SA which used legislation to inhibit the economic resources which was severely restricted through these laws and regulations.

This chapter will further explore the history of legislation that condoned discrimination of persons in apartheid-SA. It will provide a background to the legislation in SA and why voluntary actions alone will not suffice to eliminate discrimination. The reason for doing so is to show that discriminatory and segregationist policies were mandated by government and therefore it was vital that the post-apartheid government of SA becomes actively involved in eliminating discrimination. It will be shown that the many years of apartheid marginalised blacks not only from political power but from economic participation as well and reliance on labour-market voluntarism to bridge the gap which will not suffice.

4.2.1 Legislation governing Affirmative action

4.2.1.1 Labour Relations Act 66 of 1995

Until the promulgation of the Labour Relations Act (RLA), there were no provisions which prevented an employer from refusing to appoint someone on the basis of, for e.g. gender, race, or trade union membership.[134] An applicant for work has no standing to declare a dispute with an employer, even though they may have been victim of unfair discrimination.[135] Looking at the history of Discrimination in SA, employees themselves they have never done anything better. In fact, some legislative provisions specifically permitted discrimination in the workplace.[136]

The commission of Inquiry into Labour Legislation (The Wiehahn Commission), established in the aftermath of the strike wave of the early 1970's, argued that blacks should be allowed to register trade unions and have them recognised as part of the official conciliation process.[137] The Wiehahn omission recommended the incorporation of antidiscrimination principal into South African legislation by stating that. The commission cannot avoid the conclusion that in the due course discrimination in the field of labour on the ground of race colour sex, political opinion religious belief, national extraction or social origin will have to be outlawed and criminalised in south African's labour dispensation.[138]

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[134] Rycroft and Jordan A Guide to South African Labour Law (1992) at 38.

[135] Thompson & Benjamin South African Labour Law (2002) V (1) No. 43 Part CC1 at CC1-5 (Thompson and Benjamin)

[136] For example The Wage Act 5 of 1957. See Chapter Two of the Act for a more detailed explanation of some of the discriminatory legislation in apartheid-SA.

[137] Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

[138] The Wiehahn report at 3.9.2 and 3.9.3

Legislation incorporation this recommendation was passed in 1979 and resulted in huge growth in African trade unionism in the early 1980s. The LRA contains a number of provisions that specifically prohibits discriminatory treatment of employees and applicants for work. Section 187(1) (f) states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee either directly or indirectly on one or more of a number of non-exhaustive prohibited grounds. The dismissal may however be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee has reached the normal or agreed to retirement age for person employed in that capacity.[139]

The purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. It is noteworthy that in the LRA affirmative action is seen as a means to rectify imbalance in the workplace that resulted from past discrimination. SA is unique in that it does not deal with the prohibition of unfair discrimination in only one piece of anti-discrimination legislation. It has dealt with this issue in the EEA and the Promotion of Equality Prevention of Unfair Discrimination Act (PEPUDA)[140] as well.

4.2.1.2 The Promotion of Equality and Prevention of unfair Discrimination Act 4 of 2000

The purpose of PEPUDA is to prevent and prohibit unfair discrimination harassment and hate speech. People who do not fall within the scope of the EEA can bring a claim of unfair discrimination under PEPUDA so for example independent contractors who fall outside the scope of the EEA can be liable or used under PEPUDA.

The legislation does not merely apply in the workplace but also applies to the state and all the individuals living within it. The scope of legal standing established by PEPUDA is extremely broad so that any person can bring a claim of discrimination to the courts in the public interest, even if they are not directly affected themselves. Further PEPUDA defines only four acceptable defences against a claim of discrimination, viz., that the discrimination was not of the type specifically ruled out by the law, that it was reasonable and justifiable; that was part of an affirmative action programme; or that it was justified due to the specific demands of a particular task to adjudicate all claims PEPUDA has establish a system of equality courts with appointees from the human rights field.

PEPUDA is intended to be key legislative tool to respect promote and fulfil the equality right. It provides for measure to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination hate speech and harassment and to provide remedies for victims of unfair discrimination .It seeks to translate the equality right into

[139] Section 187(2) and 11 of the LRA

[140] The promotion of equality and the prevention of unfair Act 4 of 2000 enacted in February 200 (PEPUDA).

practical rules. In fact PEPUDA is considerably more explicit than the EEA on the content of the core concepts of discrimination law. For example, PEPUDA contains a definition of discrimination[141] and harassment.[142] significantly; PEPUDA is a codification of the discrimination courts jurisprudence on discrimination.[143] Therefore PEPUDA will have to be taken into account when the EEA is interpreted by the courts

4.2.1.3 Basic Condition of Employment Act 75 of 1997

To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of Basic Conditions of Employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and provides for matters connected therewith.

4.2.1.4 Skills Development Act 97 of 1998

The aim of this Act is to provide an institution framework to device and implement the national and workplace training strategies. The purpose is to develop and improve the skills of employees and to integrate those strategies within the national qualification framework. The SDA (The Skill Development Act) is not generally targeted at women although one previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education; the SDA also applies to employment services which assist prescribed categories of person to

4.2.1.5 Employment Equity Act 55 of 1998

It is the type of discrimination legislation is SAs recent past that provides the justification for the implementation of the EEA. This Act seeks to bring to an end decades of inequalities that are a result to both apartheid policies and societal prejudices and stereotypes. The EEA will seek to ensure that people of SA enjoy equality of opportunities in employment that were hitherto denied to them. This sweeping law direct all employers public and private to eliminate unfair discrimination in the workplace and requires businesses with fifty or more employees and or annual revenues exceeding certain threshold levels to implement affirmative action programmes aimed at blacks women and the disable. The employers who do not comply with the year 2000 create an impact directly on recruitment practices and the composition of the workforce.

The EEA goes further and mandate that "suitably qualified "members of disadvantaged group must be "equitable" represented at all level of company. preferential treatment and numerical goals may be used to achieve this goal, but the use of quotas is not allowed .employers are also

[141] See section 1(1) (VIII) of PEPUDA
[142] See section 1(1) of PEPUDA
[143] The constitution courts approach to discrimination will be analysed in part IV of this research

required to consult with unions an report to the Department of Labour (DoL) on its progress. Businesses failing to comply with the law are subjects to fines. The EEA requires designated employers to compile and implement an employment equity plan aimed at promoting equal opportunities and affirmative action while eliminating unfair discrimination.

The main purpose of this Act is to provide for employment equity through measures like affirmative action which will redress the imbalance of past. The EEA sets out to achieve equity by promoting the constitution right to equality as well as the exercising of true democracy. These labour laws along with a few others .form the core of the most progressive civil rights and affirmative action policies in SA. Their most striking feature is their apparent invulnerability to the kinds of constitutional itself recognises that in a deeply unequal society, certain forms of fair discrimination will be necessary to establish equality

4.2.1.6 Constitutional Provisions

4.2.1.6.1 Constitutional Basis for the EEA

The constitution embodies a number of broad fundamental human rights in chapter two which may not be encroached upon by legislative measures introduced by government. the south African constitution establishes a new democratic order based on human dignity, the achievement of equality and the advancement of human right and freedoms chapter two of the bill of right states that.[144] The South African Constitution establishes a new democratic order based on "human dignity, the achievement of equality and the advancement of human rights and freedoms.[145] Chapter Two of the Constitution which is Bill of rights –

"This bill of rights is a cornerstone of democracy in South African; it enshrines the rights of all people in the country and aims the democratic values human dignity, equality and freedom."[146] To promote the achievement of equality the constitution allows for the promulgation of legislative and other measure to protect or advance person disadvantage by unfair discrimination.[147] It is this provision on the constitution which gives authenticity to the EEA.

4.2.1.6.4 Application of the EEA

The purpose of the EEA is to promote the constitutional right of equality to eliminate unfair discrimination in employment to ensure the implementation of employment equity to redress the

[144] See section of the South African constitution
[145] Chapter Two of the Bill of right in South African Constitution
[146] Section 7(1) of South African constitution
[147] Section 9(2) of the South African constitution

effects of discrimination and to achieve a diverse workforce broadly representative of our people[148]. It also seeks to promote economic development and efficiency in the workforce. This requirement gives effect to the obligations of the Republic as a member of the International Labour Organisation (ILO).[149]

In fact, according to the Department of Justice website –

> "The purpose of the Act is to achieve equity in the workplace, by a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated group, to ensure their equitable representation in all occupational categories and levels in the workforce."[150]

Looking at the purposes of the EEA, one needs to understand to whom this obligation falls upon. One also needs to look at who must not discriminate and who must not be discriminated against. The following paragraphs look at specific provisions and obligations under the EEA.

4.2.1.6.5 Scope of the EEA

A defining feature of the South African labour market is the disparity in access to and quality of employment. Apartheid education and labour policies produced a strong racial gradient in unemployment, employment and wage rates. The ANC government has been addressing this legacy of disadvantage and injustice through job creation programmes, progressive legislation and legal reform. The Employment Equity Act (1998) is a prime example, obliging employers to implement affirmative action measures to ensure equal representation of designated groups (black people, women and people with disabilities).

However, nearly 12 years since the Act was implemented, there is disappointment, disillusion and frustration about the slow pace of transformation. Criticism also points to a policy that mainly benefits the middle and elite classes while failing to meet the needs of those at the lower end of the income distribution. The recent release of the 10th Commission for Employment Equity report has intensified debate on the successes and shortcomings of affirmative action implementation, particularly the fact that black South Africans are still substantially underrepresented in private sector management structures. In this context, it is important to explore and understand public attitudes toward this policy.

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[148] Chapter 2 of the EEA.

[149] Take from the Preamble to the EEA. Also see Charlton and Van Niekerk Affirming Action Beyond 1994 (1994) at 1.

[150] www.justice.gov.za

4.2.1.6.2 The Constitution and Equality

Section 9 (1) guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law as was stated in the case of *The President of RSA and another v Hugo*. [151]

The South African constitution is primarily and emphatically an egalitarian constitution the supreme laws of comparable constitutional states may underscore other principal and rights. But in light of our own particular history and vision for the further a constitution was written with equality at its centre equality is our constitution focus and its organising principle. This means that the constitutional commitment to equality emerges directly from the inequality and injustices of the past. The chapter on the history of affirmative action above shows that the policies of segregation and apartheid under white rule saw systematic discrimination, exclusion and dispossession of black people in all aspects of social political and economic life. This is the root of the deep social and economic dispensation that exists in SA today.[152] Section 9 of the constitution detailed equality rights provision encompassing equality before the law and equal protection of the law freedom from unfair discrimination, positive measure to advance equality and the promise of the equal enjoyment of all other rights and freedoms.[153] it establishes a commitment to the transformation of the south African society in particular to the achievement of substance equality.

Jennifer Nedelsky suggest that –

> "The question of equality (to be captured in the constitutional rights) is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we are not equal but vastly different vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about

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[151] The President of RSA and another v Hugo (1997) 4 SA (CC) 1997 (6) BCLR 708

[152] Albertyn C et al (ed) Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 Of 2000 (2001).

[153] Section 9 of the South African Constitution states that –

> Everyone is equal before the law and has the right to equal protection and benefit from the law.
> Equality includes the full equal enjoyment of all rights and freedoms. To promote the Achievement of equality, legislative and other measures designed to protect and advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> Discrimination on one or more grounds listed in subsection (3) is unfair unless it is estabilished that discrimination is fair.

equal rights but to how we can structure relations of equality among people with many different inequalities."[154]

To address these inequalities at least two forms of action are required by the constitution firstly; the eradication of barriers and obstacles that unfairly discriminate on the basis of race gender class and other grounds of inequality and secondly the development of positive measure that promote the equality of all groups and enhance the full participation of all person in society the equality right provides the constitutional framework for this in its protection against unfair discrimination.[155]

4.2.1.6.3 The Constitution and Affirmative Action

The recent release of the 10th Commission for Employment Equity report has intensified debate on the successes and shortcomings of affirmative action implementation, particularly the fact that black South Africans are still substantially underrepresented in private sector management structures. In this context, it is important to explore and understand public attitudes toward this policy.

To give effect to these constitutional rights the EEA was passed.[156] This piece of legislation is the key affirmative action legislation in SA. Although the act was passed in 1998, it only came into effect at the end of 1999.

4.2.1.6.4 Designated Employers

The EEA applies to both the private and public sectors. Chapter II of the EEA applies to all employers,[157] whist Chapter III applies only to designated employers.[158] Designated employers must, in order to achieve employment equity, implement affirmative action measures for the people from designated groups in terms of this Act.[159]

Chapter II states that all employers must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.[160] Chapter

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[154] Nedelsky J Reconceiving Rights as Relationships (1993) at 1.

[155] In this regard see section 9(3) and (4) of the South African Constitution and the provision for positive measure section 9(2) as stated in note 14 above.

[156] All references of the EEA in this reasearch are to The Employment Equity Act 55 of 1998.

[157] See Chapter 1 of the EEA regarding definitions

[158] Ibid

[159] Sec 13(1) of the EEA
Designated groups include – Black people, women, people with disabilities. According to Section 1 of the EEA "Black people" are defined to include Africans, Coloureds and Indians.

[160] See section 5 of the EEA.

III, which contain the affirmative action provisions of the Act, apply only to designated employers.[161] Employers of fifty or more workers or with an annual turnover set out in Schedule 4 of the Act, are required to draw up an employment equity plan which outlines the company's commitment to equity over the next five years.

The employment equity plan is to be submitted to the Employment Equity Commission (EEC) on a yearly basis.[162] Further, a collective agreement can also provide that a given employer is a designated employer for the purposes of the Act. The public sector is also covered except for security and defence services.

4.2.2.1 The constitutional court's interpretation of affirmative action

In SA, the repeal of discriminatory legislation has created formal conditions for the equality of all South Africans. However, recognising that injustices of the past has led to inequalities and that these inequalities cannot be addressed by treating all persons' equally at all times, the constitution has provided for a substantive approach to equality.

The underlying difficulty in this context has been one proof. Most of the existing case law arose in terms of the prohibition of unfair discrimination, previously contained in the LRA which required the applicant to prove both the existence of a discriminatory act and its unfairness. Various claims of unfair discrimination brought in terms of the LRA have failed for lack of evidence. Unfair discrimination is particularly difficult to prove and it is for this reason that courts and legislators have grappled with the incident of the burden of proof and establishment structures of proof different from those in the ordinary course in order to ensure that justice is done in discrimination claims. Bearing in mind that the reasons for discrimination fall within the permissible factor in the determination of where the onus should lie in circumstances when the onus is not fixed or certain.

The Constitution provided some assistance to applicants by providing that, where discrimination is shown to have taken place on one of the prohibited grounds, unfairness will be presumed unless the contrary is proven. "Sex," "Pregnancy" and "gender" are all included among the so called listed grounds. Perhaps the clearest illustration of the problem was provided by the decision of the Labour Appeal Court (LAC) in *Woolworths (Pty) Ltd v whitehead,*[163] where the refusal of an employer to offer more than a temporary position to a well-qualified applicant upon

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[161] Section 12 of Chapter III of the EEA. Further section 1 of the Employment Equity Act states that a designated employer is defined as –"an organ of state as defined in section 239 of the Constitution, but excluding [local spheres of government,] the National Defence Force, the National Intelligence Agency and the South African Secret Service;"

[162] A body created by the Act

[163] Woolworths (Pty) Ltd v whitehead 2000 (3) SA 529 (LAC)

learning of her pregnancy was upheld on the grounds that the applicant had failed to prove that the employer's decision was the result of her pregnancy.

It was left to the EEA to address the problem by providing that whenever unfair discrimination on one of the listed grounds is alleged, "the employer against whom the allegation is made must establish that it is fair."[164] the court held that "whilst the wording of the section is less than clear, the onus placed on the applicant appears to be reduced from having to prove "discrimination" on a balance of probabilities to establishing a set of facts from which an inference of discrimination on one or more of the prohibited grounds can be drawn."[165] This study will now look at the three most important cases and examine how the Constitutional Court (CC) has interpreted and applied the substantive equality right, thereby justifying affirmative action programmes.

4.2.2 The Development of the South African Constitutional Equality Jurisprudence

It wasn't until the year 1997 when the full test for equality and the circumstances under which different treatment may constitute unfair discrimination was finally articulated by the CC. in the case of *Harksen v Lane*,[166] the Constitutional Court (CC) laid down the test for determination whether or not a certain act or legislative provisions is unconstitutional for want of compliance with the equality clause

In October 1997, the Court decided on the constitutionality of section 21 of the Insolvency Act 24 of 1936.[167] Jeanette Harksen challenged the sheriff's attachment of her clothes, jewellery and other property as being part of her husband's insolvent estate on two grounds. The first ground was that section 21 violated the right to equality before the law and the right not to be unfairly discriminated against as protected by the Constitution. Secondly, that the attachment infringed on the right not to have ones property expropriated without compensation in terms of section 28(3) of the Constitution. The matter was decided in terms of the interim constitution. When determining the fairness of otherwise of a legislature provision or Act that is challenged on the basis of it being in conflict with the constitutional rights to equality, the CC has adopted three stage approaches-

(iv) It will firstly seek to establish discrimination;
(v) Once discrimination has been established, the unfairness thereof will then have to be established;

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[164] Employment equity Act 55 0f 1998

[165] Woolworths (Pty) Ltd v whitehead 2000 (3) SA 529 (LAC)

[166] Harksen v Lane No & Others (1997) 11 BCLR 1489 (CC).

[167] Ibid. in terms of section 21, on the sequestration of an insolvent's estate, temporary ownership of the solvent spouse's assets vests with the Master or the Trustees of the insolvent spouse's estate. In order to have the assets returned, the onus rests on the solvent spouse to prove his/her right to the assets

(vi) Thirdly, even if the discrimination is found to be unfair, the next step will seek to justify it in terms of the limitations clause.[168]

In *IMAWU v Greater Louis Trichardt Transitional Local Council*,[169] the post of Town Treasurer was externally advertised by the Respondent. Candidates had to have a relevant Bachelors degree or the equivalent qualification and at least a licentiate membership of the Institute of Municipal Treasurers and Accountants. No appointment was made even though five candidates were short listed. The post was then re-advertised, a short list compiled and candidates subjected to an internal test drafted by the respondent's Town Clerk, who was the previous Town Treasurer. A representative of the institute of Municipal Treasurers and Accountants evaluated both the test itself and the candidates. The test targeted the knowledge and experience of the candidates of local government, their merit and potential ability. After conducting the test, a further short list of three candidates was compiled consisting of Mr Van der Berg, Mr Kruger and Mr Masengana. It was submitted that the respondent did not comply with the provisions of the collective agreement on Equal Employment Practice and Affirmative Action for local government in the selection and appointment of Masengana and it had failed to develop and implement an affirmative action programme. It was further submitted that from Masengana's CV it was clear that he did not possess the necessary experience in local government to qualify for appointment, further that he was appointed simply because he was black, thus ignoring merit and other requirements set out in the collective agreement.

The Court held that affirmative action should not be applied in an arbitrary and unfair manner.

In *Minister of Finance v Van Heerden*[170]the Constitutional Court for the first time explicitly dealt with a case in terms of s 9 (2) and set out the "test" for affirmative action. Justice Moseneke (for the majority) affirmed that s 9 (2) should not be seen as creating an exception to the requirements of equality but rather than it merely affirmed that the state had a positive duty sometimes to take corrective steps to ensure the achievement of the goal of equality. It also affirmed that if the Constitutionality of an "affirmative action" or corrective action programme was attacked, the state would be able to win the case if it could show that the programme met the criteria set out in s 9 (2). It would then not be necessary to go to s 9(3) where the state would bear the onus to show that the discrimination was not unfair. It was only when a corrective action programme or policy did not meet the criteria set out in s 9(2) that the court would move on to s 9 (3) to determine whether the discrimination was fair or unfair.

[168] Harksen v Lane and Others (1998) 1 SA 300 (CC) at para 54; (1997) 11 BCLR 1489 (CC) at para 53.
[169] IMAWU v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)
[170] Minister of Finance v Van Heerden

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

Racial and gender inequality, as well as other forms of discrimination have been a part of the South African and American history for a very long time. Even today racial disparity is still very evident in the South African and American societies whilst discrimination based on class still a practice in other societies. This is illustrated by continued racial discrimination and remaining signs of social segregation.

One of the key issues that arise when affirmative action is discussed, is whether or not affirmative action, in fact, they promotes equality and atones for past prejudices. Another concerned is whether the current affirmative action policy is the right policy to use. The issue surrounding affirmative action seems to be universal as are the circumstances perhaps the most widespread similarity among the programmes in these very different countries has been that group preference and quotes are always discussed. The debate on affirmative action exist because it is very divisive issue and it affects different group of people in different ways, and some groups or persons seemingly benefit more from affirmative action than other persons or groups. In addition, it causes people to be classified into groups, and at the same time, strives to break down group barriers discrimination and it is an issue that is difficult to resolve because people have varied ideas about how problems of racial inequality and historical discrimination should be addressed.

This research recommends that Affirmative action in both South Africa and the United States (US) should be more active as it is still struggle to maintain balance in respect of previously disadvantaged groups against whites

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