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Affirmative action in employment: Recent court approaches to a difficult concept

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Affirmative action is an extension of the notion of equality of opportunity and non-discrimination. It aims to overcome the effects of past discrimination by enabling the person or group discriminated against either to compete on level terms with the favoured group or, more controversially, to achieve equality outright ("equal results"). Special measures with this aim, whether they are called affirmative action, positive action, employment equity, workplace diversity, maximalization or inclusion,[1] are not a new idea: they were first introduced in the United States[2] in the 1930s to make up for past unfair labour practices against union organizers and members and later used to assist war veterans' reinsertion in the labour market. Other groups, too, have long benefited from special programmes in employment linked to their special needs,

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[1] To clarify the use of different terms, it should be noted that the ILO Convention principally concerned — the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) — uses the wording current at the time of its adoption: "special measures". The term "affirmative action" is used in the United States and the recent Namibian legislation, for example. Another term is "employment equity", used in the recent South African legislation and coined by Judge Rosalie Abella, who headed the Canadian Royal Commission into Equality in Employment (1984). The term "positive action" is generally used in Europe, possibly as a translation back from the French "*action positive*". Other countries, perhaps disillusioned with the negative fallout attaching to the words "affirmative action", prefer "promoting or managing diversity", which, implying as it does a societal change where differences will be valued, sounds less aggressive. It appeals to managers in that it assumes that the diversity of the real world will inevitably reach the enterprise workforce, where one can learn to "manage" it in the interests of the enterprise. See also Agocs and Burr (1996).

[2] The term first appeared in the 1935 National Labor Relations Act (the Wagner Act), 29 U.S.C. in section 160(c). It subsequently appeared in the 1961 Executive Order 10925 requiring all government contractors to take affirmative action to ensure that employees were employed without regard to race, colour or national origin; in the 1965 Executive Order 11246, which repeated the language of the earlier order; and in the 1966 creation of the Office of Federal Contract Compliance Programs to enforce the Orders. In 1967 the Orders were amended by Executive Order 11375 to include discrimination based on sex and Congress expressed its approval by the adoption of the 1972 amendments to Title VII of the Civil Rights Act 1964, section 717. Other affirmative action requirements appear in the Rehabilitation Act 1973, the United States Code and the Americans with Disabilities Act 1990.

such as persons with disabilities.[3] The use of this form of labour market intervention, however, aroused controversy from the moment it was applied to two particular areas of discrimination, namely race and sex.

Critics of affirmative action — leaving aside those who play the semantic game of calling it a form of "reverse" or "negative" discrimination — claim that the concept has several fatal flaws and that it should be removed from the toolbox of possible instruments for use in adjusting imbalances in the labour market. It is variously argued that non-discrimination is such an absolute concept that it can brook no exemption; that such measures start out as temporary and narrowly tailored to the goal to be achieved but end up permanent and broad; that within the favoured group the benefits of the measure go disproportionately to those already at the top of the group in employment status; that in any case there is very little in the way of data on the real successes or achievements of affirmative action; that such measures create distortions and inefficiencies in labour markets; that the measures are usually poorly planned and permit cheating on the results; and — in relation to race-based programmes in particular — that colour-conscious policies are polarizing and fuel resentment and violence.[4] There are also politically motivated critics who claim that affirmative action implies equal results, which make it anathema in certain laissez-faire cultures.

Those in favour of affirmative action argue back that labour market policies should be realistic and admit that since society is not colour-blind or non-sexist some proactive policies are essential; that, while the planning might not always be perfect, any measure is better than inaction; that data gathering is improving and that cheating, in any system, can be controlled by better monitoring and stronger penalties; that such programmes have in fact provided too little rather than too much assistance; and that, apart from the societal advantage of better utilization of the full workforce, there are proven economic advantages.[5]

Behind this debate lies a subtler contradiction. Affirmative action allows disadvantaged groups the chance to get experience and prove themselves, but at the same time it perpetuates the perception that they intrinsically lack the characteristics for success in employment and will always need special assistance.

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[3] For example, see Hodges-Aeberhard and Raskin (1997). Also see ILO (1998, paras. 186-191), for a discussion of permissible "special positive measures" under the ILO's Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and Recommendation No. 168.

[4] For example, see various articles in *The Economist* (London), 4 March 1995, p. 16; 11 March 1995, p. 57; 15 April 1995, pp. 11-12 and 19-20; 17 June 1995, pp. 50 and 73-74; 13 January 1996, p. 34; 22 November 1997, p. 82; in *Business Day* (Johannesburg), 29 September 1998, p. 3; and in *Sunday Times* (London), 1 November 1998, p. 25.

[5] Literature is remarkably scarce on this clearly crucial aspect of affirmative action; but see, for example, Black (1996), Joseph and Coleman (1997), and University of Cape Town Graduate School of Business (1997).

Despite this four-decade-old controversy, governments continue to legislate for affirmative action in employment to favour designated groups (most commonly those described as suffering the effects of past discrimination on the basis of their race, colour, sex or disability). Witness the adoption by South Africa and Namibia, near the end of 1998, of legislation requiring employment equity through means including affirmative action (the Employment Equity Act, No. 55 of 1998 in South Africa and the Affirmative Action (Employment) Act, No. 29 of 1998 in Namibia).[6] In some countries the concept is well accepted in the fight against sex discrimination, but women are not the only beneficiaries: Norway's Ordinance No. 622 on the special treatment of men, adopted on 17 July 1998, provides for action to favour men in occupations where they are under-represented — such as education and child care — through training and job opportunities, together with procedural rules for enforcement. There are over 20 countries that have specific laws mandating affirmative action for employment on the basis of race, sex or disability, and many others that permit it. Yet court challenges to the measures have been restricted to a small number of jurisdictions. To see how they have grappled with this difficult concept is the aim of this article.

The late 1990s saw several major court decisions on the subject of affirmative action, variously reflecting hostility, lukewarm acceptance and full endorsement. They were handed down in different jurisdictions across the world, and at different levels, but all throw light on the academic and public debate on the usefulness of special measures to overcome past (and continuing) discrimination. This article selects decisions from three different jurisdictions — the United States, South Africa and the European Court of Justice — as being those which received the most attention at the time of their delivery, both from the media and from academe. Some details are added from Commonwealth jurisdictions to show that, even in the face of great public controversy, courts have supported the concept as an acceptable tool in the struggle to eliminate discrimination in employment.

This article highlights how the courts, faced with similar factual situations, arrived at different results on different occasions. Reasons for such variations are suggested, and the point is made that more rigorous reasoning at the level of lower jurisdictions and, generally, a better use of international standards might assist the courts in arriving at just and realistic decisions. The question is put whether the time has not now come for the adoption of an international instrument on affirmative action.

[6] The full text of these Acts is available in the ILO's national labour law database (NATLEX) on the Internet at <http://natlex.ilo.org>.

Selected court decisions concerning affirmative action/discrimination on the basis of race or sex

United States

It is not surprising that the United States provides the most examples of judicial examination of affirmative action schemes, since it is there that the legislation permitting such measures has existed longest. The Civil Rights Act 1964, enacted in response to the civil rights movement of the early 1960s, outlaws, in its Title VII, discrimination on the basis of race and sex; but it lies in the shadow of the Fourteenth Amendment to the Federal Constitution, which gives every citizen equal protection before the law and thus imposes severe limits on any legislative scheme that may attempt to remedy the effects of past discrimination.

In the late 1970s special schemes based on race were largely upheld (Jones, 1981), but a wave of cases in the 1980s involving race or sex discrimination in the public and private sectors gave rise to conflicting results. There were many close decisions and strongly argued dissents. The judges did not agree on a common "test" or set of principles by which to assess the acceptability of such schemes. Sometimes the supremacy of the Constitution was the key; sometimes social norms or compelling state interest overrode the strictly juridical approach. The lack of agreement was most noticeable in the Supreme Court, where a number of conservative appointees led by Justice, later Chief Justice, Rehnquist, refused to uphold any affirmative action programmes, using the argument that they were invalid under the Constitution and the wording of the Civil Rights Act. There were, however, certain recurring clues to the standards that the Supreme Court would later apply: it would look favourably on affirmative action if there was strong evidence that discrimination had in fact occurred; if preferential treatment was clearly the only means of eradicating the lingering effects of that discrimination; and if the measure under scrutiny had been worded narrowly enough not to run counter to the principal statute, the Civil Rights Act. Ten years later, however, in the mid-1990s, when United States courts again considered the permissibility of various affirmative action schemes, they withdrew the approval that this type of measure seemed to have earned, given the passage of time and the continuing labour market distortions based on past discrimination.

Two early successes for proponents of alternative action concerned special admission programmes to university. These are relevant to the theme of this article, in that the definition of employment in Convention No. 111 specifically includes access to vocational training. The first was the case of *DeFunis v. Odegaard*,[7] in which a White[8] applicant to the University of Washington Law

[7] 416 US 312 (1974).

[8] "White" and "Black" are capitalized and used throughout this article for consistency, while recognizing that designations differ between southern Africa, Europe and the United States.

School alleged discrimination on the basis of his race. The Supreme Court held that the equal protection clause of the Federal Constitution did not make all racial classifications illegal. The next affirmative action programme to be tested in the Supreme Court was *University of California Regents v. Bakke*.[9] Mr. Bakke, a White male, was denied admission to the medical school of the University of California at Davis for two consecutive years because of a special admissions programme. The programme provided that only disadvantaged members of certain minority races could be considered for 16 of the 100 places in each year's intake, leaving members of any race free to compete for the other 84 places. The complainant argued that he would have been offered a place if not for the special reservation of places based on the criterion of race. At the level of the state court, the judges struck down the special admissions programme as contravening the Civil Rights Act, the State Constitution and the Equal Protection Clause of the Federal Constitution. At the level of the Federal Supreme Court, the judges were split: although the minority warned that the use of race as the criterion for selection was inherently suspect, a 5:4 majority none the less accepted that racial classifications could be used to achieve important state policy objectives, such as remedying past social discrimination, as long as they were substantially related to the achievement of those objectives. Accepting that minorities were substantially and chronically under-represented in medical schools owing to past racial discrimination, the judges upheld the University's affirmative action measure to redress the situation.

The following year the majority of the Supreme Court followed this opinion in *Steelworkers v. Weber*.[10] The United Steelworkers and a company had entered into a collective bargaining agreement that included an affirmative action programme designed to eliminate racial imbalances in the company's almost exclusively White craft workforce. In one plant the craft workforce was less than 2 per cent Black, even though the local labour force was 39 per cent Black. One aspect of the scheme was a training programme to which entry was based on seniority, except that at least 50 per cent of the new trainees were to be Blacks until the percentage of Black craft workers rose to approximate the percentage of Blacks in the local labour force. During the first year of the training course, most of the Black trainees had less seniority than several of the White applicants whose requests for training were refused, Mr. Weber being one of the latter. The majority of the Supreme Court held that such measures did not contravene Title VII of the Civil Rights Act because that Act did not condemn all private, voluntary, race-conscious affirmative action programmes. Nor did it require them to be imposed. The Court held that, to be valid, affirmative action plans should be designed to eliminate conspicuous racial discrimination, should not lead to White workers losing their jobs or being barred from advancement and should be temporary. Such measures were, after all, intended not to maintain racial imbalances but rather to eliminate them.

[9] 438 US 265 (1978).

[10] 443 US 193 (1979).

Focusing on the use of the words "to require" [11] in Title VII of the Civil Rights Act, the Court ruled that the Act's prohibition of racial preferences as a remedy for past discrimination did not extend to voluntary plans. However, there could not be an unlimited use of preferences in voluntary plans, which were permissible only when they were designed to break down old patterns of racial segregation and hierarchy, open up employment opportunities that had been closed to Blacks and, crucially, did not "unnecessarily trammel the rights of white employees", although this phrase was not clarified. Two of the judges, however, argued that affirmative action programmes were ruled out altogether by the plain language of the Civil Rights Act and its spirit and legislative history.

In *Firefighters v. Stotts* [12] the Supreme Court was faced with a Federal District Court order disallowing the proposed layoff and demotion of junior Black employees according to an established, strict-seniority layoff procedure. The proposals would have largely undone the progress made by a hiring and promotion plan that had been agreed upon in a consent decree settling a lawsuit brought by minorities and a Black person alleging racial imbalances in the workforce. The Supreme Court held that the lower court had erred because its injunction was neither an enforcement of nor a valid modification to the original consent decree, and no evidenciary hearing had been conducted. The majority decision recalled that Title VII prohibits courts from requiring racial preference as a remedy for past discrimination unless the preference benefits only the actual victims of that discrimination; but this interpretation was strongly attacked by the minority dissenting judges.

The uncertainty induced by these decisions — including doubts over the degree to which federal courts are limited in the kind of relief they can order to remedy past discrimination — was partly cleared up by a series of Supreme Court decisions in the mid-1980s.

In *Local No. 93, International Association of Firefighters v. City of Cleveland*, [13] the Supreme Court upheld (5:4) a consent decree by a Federal District Court requiring that a specified number of promotions (half of the scheduled promotions to lieutenant and 10 of the promotions to captain and battalion chief) be given to firefighters from racial minorities for four years. The fact that there was clear evidence of past racial discrimination in the promotion of firefighters was the key to this support for the special measure, even though it used the sensitive criterion of race. The dissenting judges again argued that the application of the law ought to be colour-blind. Likewise, in *Sheet Metal Workers v. EEOC* {Equal Employment Opportunity Commission} [14] the Supreme Court

[11] Section 708 of Title VII of the Act reads: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title."

[12] 467 US 561 (1984).

[13] 478 US 501 (1986).

[14] 478 US 421 (1986).

upheld an affirmative action programme, imposed by a Federal District Court to increase the non-White membership of a union, because a pattern of manifest discrimination by the union had been proved. The case thus clarified that affirmative action was a permissible remedy for a class of individuals, even if there was no proof that every one of the individuals had actually suffered under the discrimination involved. In this way the "egregious" test was born, allowing class-based relief where an employer or labour union had engaged in persistent or egregious discrimination. The judgement of the majority referred repeatedly to the evidence proving the Union's blatant discrimination. Would this mean, in future cases, that only particularly repugnant situations would justify a court upholding affirmative action measures? Again, three judges dissented on the same grounds as in the *Local No. 93* case.

The dissenters just won the day in a third case heard by the Supreme Court in 1986, *Wygant v. Jackson Board of Education*.[15] In that case, a Board of Education and a teachers' union in Michigan had added to their collective bargaining agreement an affirmative action provision giving special treatment to teachers from minority groups during layoffs: dismissals could not exceed the percentage they represented in the teaching workforce. As a result, some White teachers, including Ms. Wygant, were laid off, while minority teachers with less seniority were retained. In a 5:4 decision, the Court held that the layoffs violated the Equal Protection Clause of the Constitution. Yet the following year a sex-based affirmative action programme was upheld in *Johnson v. Transportation Agency*.[16] The Transportation Agency of a Californian County had adopted an affirmative action plan for the promotion of female employees in jobs where women had been traditionally under-represented. The plan clearly stated that its objective was to achieve a statistically measurable yearly improvement in the hiring, training and promotion of women and minorities. Alongside the short-term goals, the plan provided for annual evaluation and adjustment, so that it could be used as a realistic guide for actual employment decisions. When, in filling one vacancy for promotion, the director of the agency did not follow the interviewing panel's recommendation of Mr. Johnson but chose the third-ranked female applicant, taking account of the affirmative action policy, as well as the candidates' qualifications, test scores, expertise and backgrounds, Mr. Johnson challenged his non-promotion. The choice was found, however, to be consistent with the prohibition of discrimination in employment imposed under Title VII of the Civil Rights Act on the grounds, inter alia, that consideration of the applicant's sex was justified by the existence of a manifest imbalance reflected in the under-representation of women in traditionally segregated job categories. The Court held that an employer, when seeking to justify the adoption of an affirmative action plan, did not need to show evidence of its own prior discriminatory practices, or even of an arguable violation on its

[15] 476 US 267 (1986).

[16] 480 US 616 (1987).

part, but need only point to a conspicuous imbalance in the job categories. The Court also used the test introduced in *Weber* that the agency's plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement. Again, there was a forceful dissent, on the grounds that the Civil Rights Act was being misused to protect discrimination instead of eliminating it. The Supreme Court has not decided any gender case relating to the public sector.

Reasoning on which decisions were based

Analysis of these 1980s decisions shows that, while the Supreme Court handed down conflicting decisions, it was starting to build a matrix of reasoning that overrode the plain language of the Civil Rights Act. First, it rejected the argument that affirmative action should benefit only the actual victims of discriminatory behaviour when it accepted that a plan need not be linked to the employer's own practices but could be justified by traditional imbalances in the workforce. Second, the basis on which an affirmative action plan had been adopted appeared to be crucial to its success. In *Wygant* there had been a voluntary agreement with a union to quell racial tension. In *Local No. 93* there had been a consent decree whereby a court had approved a settlement reached by the parties to a lawsuit. This was different from the *Stotts* situation, where a court had attempted to add to the original consent decree without the employer's specific agreement to the injunction against out-of-seniority layoffs. In *Sheet Metal Workers* there was a court order following a trial. In *Johnson* there had been the agency's clear policy decision, tempered by several checks and balances like the monitoring and annual change to the plan. Another emerging factor was the type of measure involved: in *Wygant* the fact that layoffs from existing jobs were at issue weighed heavily in the Court's disapproval of the measure, but in *Local No. 93* the preferential hiring and training goals were upheld, given that the burden to be borne by non-preferred groups was diffused among society generally. Denial of future employment opportunity was seen to be less intrusive than loss of a current job, although this raises the question whether affirmative action will be judged permissible by the courts during periods of economic growth when employers are hiring and promoting but not during hard times when layoffs are common. Lastly, the amount of evidence proving the existence of discrimination entered into the matrix of factors considered by the Court.

The trend of court support for affirmative action was reversed in the mid-1990s under the new conservative majority of the nine-member Supreme Court, including Black Justice Clarence Thomas, who had been nominated by President Bush in 1991. Its reasoning appeared to favour a return to reading the Constitution as protecting the individual rather than groups and to diluting the role of government in addressing racial discrimination. The use of the specific criterion of race, barred to the government by history and by statute, was now anathema to the Court. Its attack on affirmative action led President Clinton to order a thorough review of government affirmative action programmes in Feb-

ruary 1995[17] and caused the Attorney-General to issue policy guidelines to all federal agencies using affirmative action measures.[18]

In *Adarand Constructors Inc. v. Peña*,[19] a case concerning affirmative action aimed at improving racial balance in the domain of public procurement, the Court (again by a close 5:4 majority) applied a strict judicial scrutiny test to affirmative action programmes adopted by the federal government. It followed the 1989 decision in *Richmond v. J. A. Croson Co.*,[20] which had struck down race-conscious affirmative action at the level of local and state governments using a strict judicial scrutiny test of whether the measure in question met an overriding government concern. The test involved past discrimination being identified by a properly authorized government body, and past societal practice generally. The City of Richmond's plans to overcome race discrimination did not meet this test and they were declared unconstitutional. The programme under examination in *Adarand*, the Small Business Administration, provided a financial bonus to contractors on federal highway projects in Colorado who subcontracted to firms owned by socially and economically disadvantaged individuals. The decision clarified that the Fourteenth Amendment afforded individuals, not groups, the right to demand equal protection before the law and that this was a fundamental principle of conventional jurisprudence. However, although the Court sent the case back to a lower court with directions to apply strict scrutiny to the contract requirements in order to assess whether they were sufficiently narrowly tailored to meet the stated aim of a compelling government interest, seven out of the nine members of the Court specifically reaffirmed, as a matter of principle, the legitimacy of results-oriented preferential treatment of disadvantaged persons, subject always to the strict scrutiny requirements.

In *Hopwood v. State of Texas*,[21] the Fifth Circuit Court of Appeals struck down affirmative action for non-Whites which had been implemented under the University of Texas Law School's preferential admissions programme set up in 1992. The reasoning followed the strict legal construction put on the Civil Rights Act, that race could not be used as a criterion in admitting students. Leave to appeal to the Supreme Court against this decision was refused.

In *The Coalition for Economic Equity and Others v. Pete Wilson and Others*,[22] the Ninth Circuit Court of Appeals was called on to decide whether a provision of the Californian Constitution prohibiting race and gender preferences violated the Equal Protection Clause of the Federal Constitution and the Civil Rights Act. On 5 November 1996 54 per cent of Californian voters had adopted Proposition 209,

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[17] See, for example, *Washington Post* (Washington, DC), 10 April 1995, A1 and A9, and 1 June 1995, A7; *The Economist* (London), 17 June 1995; and *New York Times* (New York, NY), 8 December 1995, A24.

[18] See *Washington Post* (Washington, DC), 23 June 1995, A.

[19] 115 S. Ct. 2097 (1995).

[20] 488 US 469 (1989).

[21] Docket No. 94-50569 (1996).

[22] Docket No. 97-15030 (1997).

which aimed at eliminating public race- and gender-based programmes in areas of public employment, contracting and education. Outraged by this result, groups representing the interests of racial minorities and women won a temporary restraining order and a preliminary injunction to stall implementation of the Proposition. They won at the District Court level, but the decision was overturned by the Court of Appeals, which appeared to be at pains both to protect the divide between the legislature and the judiciary and, as a federal tribunal construing a state law that had not yet been challenged at the highest level within the state apparatus, not to upset the federal/state power balance.

The decision merits attention for its insistence that discrimination on the grounds of race and gender requires "a compelling governmental interest, an extraordinary justification" (para. 10). It does not analyse the concept of affirmative action but devotes most of its reasoning to issues of legal construction and the hierarchy of laws, thus following the approach of strict judicial scrutiny endorsed in *Adarand*. It concludes that a ban on race and gender classifications does not, as a matter of law and logic, violate the Fourteenth Amendment to the Constitution from the point of view of either the constitutionality test or the "political structure" test, which asks whether a given measure removes to a remote level of government the right to fight certain issues (paras. 11-12). In response to legal and procedural arguments, the decision states that Title VII of the Civil Rights Act does not pre-empt — override or automatically invalidate — Proposition 209, since section 1104 of the Act permits general pre-emption only if a specific inconsistency is apparent. When it does address the substance of the case, the court reverts to the criterion of individual suffering under the discriminatory practice concerned, arguing that the Fourteenth Amendment guarantees equal protection to individuals and not to groups. As the decision does not throw light on the "egregious" test nor on the weight to be given to the type of measures covered, it remains doubtful whether future cases will follow its approach.

European Court of Justice

Another challenge to affirmative action received much publicity in the early 1990s, when the European Court of Justice (ECJ) delivered its decision in *Kalanke v. City of Bremen*.[23] This was the first case in which the ECJ was asked to consider whether a legal rule laying down affirmative action for women was compatible with the Equal Treatment Directive,[24] Article 2(4) of which reads: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)" {employment, including promotion, vocational training and working condi-

[23] Case C-450/93: Eckhard Kalanke v. Freie Hansestadt Bremen, delivered 17 October 1995, reported 1995 IRLR 660.

[24] Council Directive 76/207/EEC of 9 February 1976, in *Official Journal of the Communities* (Brussels), 1976, No. L. 39/40.

tions}. In this case, Bremen's public sector Equal Employment Law, section 4(2), provided that for both recruitment and promotion in sectors where women were under-represented — that is, if they did not constitute 50 per cent of the personnel in each of the various grades of the category concerned — a woman having the same qualifications as a male applicant must be given preference over him. When it was decided to appoint a female candidate to be section manager in the City's Park Department on the grounds that there were fewer women section managers than men, Mr. Kalanke appealed against his loss. He argued that he was better qualified and that, even if he and the female chosen had been equally qualified, the preferential treatment given to her amounted to discrimination against him because of his sex. Had it not been for section 4(2) of the law, he would have been promoted on social grounds because he had to maintain three dependants (a wife and two children), whereas the female candidate had no such obligations. Mr. Kalanke lost his case at both the local and regional Labour Court levels, and the Federal Labour Court asked for a ruling from the ECJ on whether the national law was consistent with the Equal Treatment Directive. The ECJ struck down the national law, saying that any automatic preference for equally qualified women had to be considered an infringement of the Directive:

> A national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented involves discrimination on grounds of sex {para. 16} ... National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive {para. 22}.

By referring explicitly to automatic preference, the ECJ restricted the scope of its judgement to unconditional preferential treatment, without introducing other tests, such as individual hardship or trammelling the rights of other groups. In considering the scope of Article 2(4) of the Directive, the ECJ noted that the provision was designed to allow measures which, although discriminatory in appearance, were in fact intended to eliminate or reduce instances of existing inequality: for example, it was acceptable to give women a specific advantage in the sphere of employment, including promotion, with a view to improving their ability to compete in the labour market and pursue a career on an equal footing with men. At the same time, a derogation from an individual right laid down in the Directive had to be interpreted strictly. However, although the Court appeared to attempt to examine the overall aim of the affirmative action measure — as the United States Supreme Court had tried in the 1980s — the wording used was peculiarly opaque and the fact that it was placed at the end of the judgement implies, moreover, that it was an adjunct to the main line of reasoning:

> Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity {para. 23}.

The ECJ appeared to be saying that, even if the goal of the measure were to be a factor in evaluating affirmative action, the method chosen in the Bremen statute went beyond ensuring equality in access to career paths and promotions because it aimed at ensuring a particular result; as Faundez (1994) puts it, this is the dilemma between ensuring equality of opportunity and equality of result.

The ECJ decision gave rise to a great deal of controversy throughout Europe, where European Community (EC) member States had been active in adopting and implementing affirmative action programmes in favour of women in the belief that this was not only legally permissible because of Article 2(4) of the Directive, but politically, socially and economically advisable. Academics and equality practitioners criticized the decision as interpreting the Directive over-narrowly. Some commentators (for example, Schiek, 1996) argued that section 4(2) of the Bremen law simply served to exclude selection criteria (such as being the "breadwinner" or having longer service, which worked in the German civil service to the advantage of men) which would have amounted to indirect discrimination against female candidates. Others tried to put the outcome down to the wording of the affirmative action measure, which lacked the flexibility to look at other criteria such as the individual hardship suffered by those not covered by the measure. The Commission of the EC drew together all these currents of thought in the communication it decided to present to the European Parliament and the Council of Ministers containing its interpretation of the *Kalanke* judgement.[25] The Commission concluded that the ECJ had condemned only the automatic character of the Bremen measure, whereby women were given an absolute and unconditional right to appointment or promotion. The Commission thus took the position that the only type of quota system which was unlawful was one which was completely rigid and did not leave any possibility of taking account of individual circumstances. EC member States were therefore free to have recourse to all other forms of affirmative action, including flexible quotas.

On 11 November 1997 the ECJ delivered its second decision on affirmative action in *Marschall v. Northrhine-Westphalia*.[26] Mr. Marschall, a teacher, had applied for a higher position along with a woman candidate; since the two were equally qualified and fewer women than men were employed in the relevant pay and career bracket, the woman had to be appointed by virtue of the 5 February 1995 amendment to the Law on Civil Servants in that *Land*. The provision in question reads: "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless

[25] COM(96)88 final, catalogue no. CB-10-96-159-EN-C, Office for the Official Publications of the European Communities, L-2985, Luxembourg.

[26] Case C-409/95 (reference for a preliminary ruling from the Verwaltungsgericht Gelsenkirchen): Helmut Marschall v. Land Nordrhein-Westfalen, in *Official Journal of the Communities* (Brussels), C7 of 10 January, 1998, p. 4.

reasons specific to an individual {male} candidate tilt the balance in his favour." The Administrative Court to which Mr. Marschall appealed had doubts, in view of *Kalanke*, as to whether the *Land* law was compatible with the Equal Treatment Directive and referred the question to the ECJ. The Court's decision was eagerly awaited, since, by contrast with *Kalanke*, the national law in question included a proviso, or saving clause, under which reasons specific to the other (male) candidates could predominate.

The ECJ held that the rule was not precluded by Article 2(1) and (4) of the Directive, provided that, in each individual case, the rule gave male candidates who were as qualified as the female candidates a guarantee that the candidatures would be the subject of an objective assessment taking account of all criteria specific to the candidates and would override the priority accorded to females candidates where one or more of those criteria — if not discriminatory against the female candidate — tilted the balance in favour of the male candidate. According to the judgement:

> In providing {the saving clause}, the legislature deliberately chose, according to the *Land*, a legally imprecise expression in order to ensure sufficient flexibility and, in particular, to allow the administration latitude to take into account any reasons which may be specific to individual candidates. Consequently, notwithstanding the rule of priority, the administration can always give preference to a male candidate on the basis of promotion criteria, traditional or otherwise {para. 5}.

The ECJ outlined the rationale for permitting special measures under Article 2(4) of the Directive, accepting, however, *Kalanke*'s approach that, since Article 2(4) constitutes a derogation from an individual right laid down by the Directive, a national measure specifically aimed at favouring female candidates cannot guarantee absolute and unconditional priority for women in granting promotion without going beyond the limits of the exemption laid down in that Article. The inclusion of a saving clause did not necessarily ensure that the limits would be respected; saving clauses must ensure an objective assessment of all criteria specific to the individual candidates, at the same time without discriminating against the female candidates. The judgement gave no insight into how the other criteria could be tested as not being discriminatory against women, although it stated:

> it appears that, even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding {para. 29}.

This may mean that, in evaluating factors pertaining to individual male candidates, items that might tilt the balance in their favour, such as longer service, will not be acceptable, since competing women may have had career interruptions or breaks in service due to family responsibilities.

Analysis of these ECJ decisions shows that the warmth with which affirmative action for women had been greeted in the 1970s and 1980s in Europe cooled when laws gave automatic preference to female candidates for promotion. But the most recent judgement in the matter demonstrates that the problem can be resolved by including a saving clause in the affirmative action provision. The fact that the Court requires the insertion of these saving clauses to ensure that no new discriminatory element creeps in re-establishes the strong European support for permitting proactive measures in the struggle to eliminate discrimination in employment. Further confirmation of this appears in Article 141 of the new Amsterdam Treaty (former Article 119 of the Treaty of Rome), paragraph 4 of which states:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

South Africa

Two recent cases in South African lower courts demonstrate that, even in an environment where affirmative action to overcome past discrimination is openly accepted as being the most appropriate method to achieve equality, there can still be misconceptions about it as a form of discrimination.

The Constitution to end the former apartheid dispensation (Act No. 108 of 1996) makes it clear that race and sex discrimination must be eliminated.[27] The interim Constitution of 1994 had given special emphasis to affirmative action in the public service when it proclaimed, in section 212:

> (2) Such public service shall ... (b) promote an efficient public administration broadly representative of the South African community ... (4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account ... (5) Sub-section (4) shall not preclude measures to promote the objectives set out in sub-section (2).

[27] Section 9 reads: "... (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) ... National legislation must be enacted to prevent or prohibit unfair discrimination {by individuals}."

The Public Service Act's provision on the filling of vacant posts reflected the political decision to make the former bastion of the White labour force "broadly representative of the South African community".[28]

The creation of a representative civil service through affirmative action was thus an immediate constitutional objective; yet, in *Public Servants Association of SA and Others v. Minister of Justice and Others* (1997),[29] the Minister of Justice's appointment of women to 30 vacant posts in his Ministry, on the basis that they came from under-represented groups, was struck down by the High Court (Transvaal Provincial Division).

When 16 White males working in the Ministry applied for the posts and were not interviewed, then saw the posts filled by women, they alleged unfair discrimination against them because of their race and sex. They and their staff association requested the High Court to issue, inter alia, (1) an interdict to stay the appointments as being illegal under the Public Service Act and the terms of an agreement negotiated within the Public Service Bargaining Council, and (2) a declaration to set aside the appointments made to the vacant posts because they took into account the race, colour or gender of the applicants. Swart J., in an extraordinarily frustrating judgement, repeated the constitutional and statutory requirements of a representative public service and the various staff codes and agreements, attempting to reconcile the new approach with previous civil service practice, but devoted much of his reasoning to an intricate examination of the personal attributes of the 16 White male applicants and a summary examination of the attributes of those who won the vacancies. In assessing why the 16 should have been given the posts on merit and in evaluating their qualifications as superior to those of the female candidates ("the ladies" is the term used, p. 253), the judge listed their school achievements, giving details of their sporting prowess at rugby and cricket and using phraseology such as "outstanding sportsman". He praised some of them as having served previously in the South African Police Force or intelligence forces or as deacons and elders of the Church, apparently unaware of the lack of sensitivity in using the apparatus of the former apartheid era as the benchmark for holding posts under the new regime. Likewise, there appeared to be no consciousness of attributes that are inherent to legal positions in government service, such as university qualifications, although he gave weight to length of service, without evaluating why these candidates had not moved up in the civil service hierarchy but had been upwards of 15 years in the same posts. In discussing length of service, he noted that some of the women appointed had qualified as lawyers only about five years earlier and, if appointed, would "jump several officers on the merit list" (p. 253). He gave weight to the fact that similar information on the outstanding

[28] Act No. 103 of 1994, section 3(5)(a)(vii) reads: "The {Public Service} Commission may, in accordance with section 212(5) of the Constitution and notwithstanding the provisions of section 11, give directions regarding measures to promote the objectives set out in subsection 212(2) of the Constitution."

[29] Reported in *Industrial Law Journal* (Kenwyn, SA), Vol. 18, Part 2, 1997, pp. 241-322.

qualities of the women appointed had not been presented by counsel for the respondent so as to justify their appointment on grounds other than affirmative action.

Swart J. barely disguised his contempt for the concept of special measures, stating "I think these excerpts from the staff codes amply illustrate that up to this stage, despite the provisions of the Constitution calling for representativity, affirmative action had not raised its head and inter alia promotion{s} ... were filled strictly in accordance with an extensive and detailed merit system in which race and gender could not be taken into account" (p. 259).

When the judge examined the law and codes regulating promotions in the public service, he wrote at length about the procedures that were discussed with a view to accommodating the new race and gender representativeness requirements. There was no doubt that the Public Service Act had been an important element in the Ministry's rationalization and affirmative action plans. Yet the judge concluded that "suitability" as a criterion for public service appointment and promotion — which historically took no account of race and gender — could not be replaced to take account of race and gender under the new dispensation. Five tests were used to show that the non-appointment of the White males did not fit with the interim Constitution's proscription of racial and sexual discrimination, nor had it been proven that the appointments were of the kind permitted under the Constitution's special measures exception.[30] The tests, according to Swart J., were: (a) the measure must be designed (not a random action); (b) it must be designed to achieve something (a causal connection between the measure and the aim); (c) the objectives of the measure must be adequate protection (not out of proportion) to overcome previous disadvantage; (d) the adequate protection must be in order to give the disadvantaged person or group their full and equal enjoyment of all rights and freedoms (not without limits, but with due regard to the rights of others and the interests of the community); and (e) the measure must fit with the constitutional requirement of an efficient public administration broadly representative of the South African community (representativeness cannot override efficiency). He concluded that the earmarking of the 30 posts did not fit into any overall plan or policy; it did not meet the representativeness requirement; it went far beyond what might have been an adequate response because it affected high-level posts rather than entry-level posts; it disregarded the rights of others by ignoring the "outstanding qualifications" of the White males; and, lastly, it did not respect the efficiency requirement, since the women promoted were unimpressive when compared to the White men.

[30] Section 8(3)(a), the precursor to section 9 of the 1996 Constitution quoted in footnote 27 above, reads: "This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms ..."

Critics of affirmative action in South Africa applauded this decision, but within months the Industrial Court handed down a far more positive evaluation of affirmative action, this time in the private sector.

In *George v. Liberty Life Association of Africa Ltd* (1996),[31] President Landman undertook the first full examination of the concept itself, using the newly adopted sources such as the 1996 Constitution and the 1995 Labour Relations Act, as well as seeking inspiration from the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). In that case, Mr. George, a White employee of the firm, had applied for a higher post in the company advertised on an internal notice board as "corporate only", which meant that it was open exclusively to internal candidates in accordance with the policy outlined in the firm's Staff Handbook. Although during interviews and talks with personnel staff he was informed that he was a suitable candidate, a Coloured affirmative action candidate from outside the company was given the job. It transpired that the post had also been advertised externally. The applicant argued that the appointment of the outsider constituted an unfair labour practice because race was the deciding factor and that the appointment was invalid because the employer had failed to comply with its own policy of giving preference to internal candidates. In giving primacy to section 8(3)(a) of the interim Constitution, the President of the Court defined affirmative action not as the value or norm — the attainment of equality and non-discrimination — but as the method, strategy or procedure by which equal employment opportunities would be achieved. The Court took care to clarify that, in accordance with South African judicial policy of not intervening in areas of managerial prerogative, it would not comment on the merits of the candidates but would restrict itself to examining the appointment in the context of respect for the law, both substantive (the balance of competing values and the role of affirmative action in achieving them) and procedural. This is a marked turn away from the approach of the Transvaal High Court.

The Industrial Court found that the candidate appointed was historically disadvantaged educationally and that, from this angle, his appointment could not be said to amount to an unfair labour practice in the contemporary circumstances of the South African workplace. However, with regard to the procedure followed by the firm in making the appointment, the Court held that, upon a proper interpretation of the company's job posting and placement policy, Mr. George ought to have been given preferential consideration over any external candidate. It was on this count that the Court found the appointment to constitute an unfair labour practice and allowed the applicant's claim for costs. Leaving aside the actual decision, the establishment of reasoned support for affirmative action in this decision is to be applauded. Given that these cases were heard at different levels, it remains to be seen which jurisdiction's approach will be followed in other challenges to affirmative action in South Africa.

[31] Reported in *Industrial Law Journal* (Kenwyn, SA), Vol. 17, 1996, pp. 57ff.

Other jurisdictions

Australia

Also in the mid-1980s, special measures appearing in Australian legislation were put to the test. In *Gerhardy v. Brown*,[32] section 8 of the Commonwealth Racial Discrimination Act 1975, which provides that special measures on the basis of race are not discrimination, was used to uphold a state law denying certain rights to non-members of an indigenous Aboriginal tribe. Under the Pitjantjatjara Land Rights Act of South Australia 1975, a large area of north-west South Australia was vested in the Pitjantjatjara people, who had unrestricted access to the land, while non-Pitjantjatjaras had to have special permission. Brown went on to the land without permission and, when charged with an offence, argued that the South Australian statute was inconsistent with the Racial Discrimination Act and consequently invalid. The High Court held that the South Australian Act was a special measure for the purposes of section 8 of the federal Act and not inconsistent with it. Consequently, non-Pitjantjatjaras could be excluded from the land.

In the area of sex discrimination, too, the Australian jurisdictions have based moves to achieve equality and overturn past discrimination on the statutory support for special measures. Section 33 of the federal Sex Discrimination Act 1984 provides that it is not unlawful to perform an action to ensure that persons of a particular sex or marital status or pregnant women have equal opportunities with others. In that connection, the Industrial Relations Commission[33] approved a rule, in a proposed amalgamation of three unions into one, whereby the post of branch vice-president for each branch of the union was reserved for a woman, voted in by women members. The Commission held that the provision was a special measure designed to assist the achievement of factual equality and thus permissible under section 33. The following year, another specialized tribunal examined allegations that the arrangements by which the federal and Australian Capital Territory (ACT) governments jointly funded the ACT Women's Health Service discriminated against men because it was available only to women. In *Proudfoot v. ACT Board of Health and Others* (1992),[34] the Human Rights and Equal Opportunity Commission held that the governments had concluded, after extensive consultation, that special measures of the kind taken were required for the promotion of women's health. In the Commission's opinion, such a conclusion was not unreasonable. Consequently these measures came within the terms of section 33 of the Sex Discrimination Act. Although not a case in the field of employment law, it is cited here because of the interesting approach towards the role of the deciding body. It stands in sharp contrast to the complex arguments put forward by the United States Supreme Court in the 1980s when attempting to justify its upholding of certain

[32] *David Alan Gerhardy v. Robert John Brown* (1985) 159 CLR 70.

[33] Industrial Relations Commission Decision 93/1991; 93 IRCommA.

[34] HREOCA 6 (17 March 1992).

affirmative action programmes despite the wording of the federal laws. The American judges seemed to be grappling with tests of the necessity and appropriateness of a given programme or measure, whereas the President of the Australian Commission stated:

> Ultimately, it is not for the Commission to actually determine whether the challenged initiatives are in fact necessary or even wholly suitable for achieving the purposes of promoting equal opportunities as between women and men in the field of health care. All that s{ection} 33 requires is that those who undertake the measures must do so with that purpose in view and that it be reasonable for them to conclude that the measures would further the purpose.

India

In 1992 the Supreme Court of another Commonwealth country likewise upheld affirmative action measures, even though there were major public protests surrounding them. The Constitution of India permits the State to make provision for posts to be reserved for any backward class of citizens not represented adequately in state services and to promote with special care the educational and economic interests of the weaker sections of the population, in particular the scheduled tribes and scheduled castes.[35] After four decades of implementing a reservation policy, the representation in the civil service of these latter two groups was still considered inadequate. In 1979, a special body, known as the Mandal Commission after its President, was set up to determine how to improve conditions for the socially and educationally disadvantaged classes. In its report to parliament, the Commission recommended that 27 per cent of the posts in undertakings and educational establishments of the central and state governments be reserved for the Hindu, as well as the non-Hindu, disadvantaged classes. On 31 August 1990 the central Government issued a memorandum reflecting the 27 per cent reservation, which was amended by a further memorandum reserving 10 per cent of civil service posts for other "backward sections" not covered by other reservation schemes, that is for poor upper-class people. The memorandum was challenged in the case of *Indira Sawhney and Others v. Union of India and Others* (1992).[36] The Supreme Court declared that the 27 per cent reservation was valid as a means of overcoming past and continuing discrimination on the basis of social origin and ruled that it should be implemented except in respect of socially advanced persons (the so-called "creamy layer" of society). Following the Court's validation of the measure, an expert committee was established to specify the scope of the creamy layer exclusion and on the basis of its recommendations the central government issued a Notification in September 1993 announcing a 27 per cent reservation for the 1,200 Other Backward Classes in central government posts.

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[35] For an analysis of the 1960s and 1970s court challenges to India's constitutionally entrenched affirmative action, which turned on the definition of caste and class in the Constitution, see Faundez (1994), pp. 22-25.

[36] Writ petition (Civil) No. 930 of 1990, Ministry of Welfare, India.

The United Nations and ILO position

The ideological roots of affirmative action are international, appearing in the various United Nations declarations and treaties, in ILO instruments and in the jurisprudence of the ILO supervisory bodies. It is the notion of equality permeating United Nations instruments from the Charter onwards that forms the bedrock on which affirmative action was built.

The Universal Declaration of Human Rights, whose fiftieth anniversary has just been celebrated, contains the classic statement that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Art. 1).[37] The International Convention on the Elimination of All Forms of Racial Discrimination[38] stressed the importance of proactive measures against racism and provided the basis for future tests as to the acceptability of such measures by including the notions of necessity, the holistic approach, proportionality to the aim to be achieved, and temporal limits. Its Article 2(2) states that:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights likewise required States Parties to adopt and implement policies to eliminate discrimination on a number of grounds.[39] In the struggle for women's equality, the Convention on the Elimination of All Forms of Discrimination against Women[40] adopted the corollary of the simple ban on discrimination, namely an obligation to take specific action to overcome the results of past and present discrimination. Its Article 4(1) reads:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

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[37] The full text of the Universal Declaration is included in a special issue of the *International Labour Review* on "labour rights, human rights" (Vol. 137 (1998), No. 2).

[38] General Assembly resolution 2106 A (XX) of 21 December 1965.

[39] General Assembly resolution 2200 A (XXI) of 16 December 1966, Articles 2(1) and 3, and Article 2(2), 3 and 7(c), respectively.

[40] General Assembly resolution 34/180 of 18 December 1979.

The ILO, being the oldest specialized agency of the United Nations system, had already adopted texts on eliminating discrimination in the areas under its mandate — employment — some years earlier. The 1958 Session of the International Labour Conference adopted the Discrimination (Employment and Occupation) Convention (No. 111), with the accompanying Recommendation No. 111.[41] It requires ratifying States to adopt and implement, with the cooperation of the social partners (and, as the Recommendation points out, appropriate national machineries), a national policy to eliminate discrimination in employment. The Convention defines employment broadly, to cover not only access to jobs and terms and conditions of employment but also access to training; and indeed the supervisory bodies have included access to schools and tertiary education as well as vocational training institutions in their scrutiny.

The key provision for the employment equity debate is Article 5(2):

> Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

The last phrase of that Article makes it clear that the principal international instrument on equality in employment gives rise to no semantic or ideological confusion, or juggling with the concept of equality. Affirmative action is not discrimination under Convention No. 111. Despite that clear position, there has still been ideological opposition to the concept, over and above the complaints about the difficulty of applying it in practice and the media reactions referred to above. As Faundez (1994) puts it, "Critics of affirmative action, on their part, generally argue that these measures violate the principle that individuals competing for goods ought to be treated as equals" (p. 1).

The ILO supervisory bodies,[42] when verifying whether ratifying States have adopted "special measures", have welcomed affirmative action and employment equity measures, without differentiating between the terms.[43] The supervisory bodies consider them part of national policy to overcome past or present workplace discrimination. They have stated, in line with what is in the text itself, that such measures are not, for the purposes of the Convention, discrimination; therefore the ILO does not use phrases like "reverse discrimination", since the instrument itself makes it clear that proactive steps, preferences and "favouritism", as some critics call it, have to be accepted as legitimate tools in the fight against employment discrimination. This logic flows from the realization that the statutory proscription of discrimination is not enough to make it disappear in practice.

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[41] As of 31 March 1999, it has received 132 ratifications, making it one of the most widely ratified of the ILO's labour standards.

[42] Principally the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards.

[43] See, for example, ILO (1996, paragraphs 183-185).

The Committees have not had to assess the United States' and South Africa's varied court approaches to affirmative action, as the former has not ratified Convention No. 111[44] and the latter ratified on 5 March 1997, with the first report on its application due for examination only this year. However, as Germany has ratified the Convention, the CEACR had to examine how far the sex equality rules adopted by the City of Bremen, struck down by the European Court of Justice in *Kalanke*, were compatible with Article 5. The CEACR avoided any statement indicating criticism of the automatic preference for women where candidates of different sexes shortlisted for promotion were equally qualified, in sectors where women were under-represented. Instead, it noted that this development would affect Germany's application of Convention No. 111 and asked the Government to inform it of the practical impact of the ECJ decision. This information was provided by the Government in its next report (see ILO (1998a, p. 337)). In the case of the Indian Supreme Court ruling upholding affirmative action on the basis of caste, the CEACR welcomed the measure and asked to be kept informed of the results it achieved in relation to workforce participation and working conditions. The Australian cases were not brought to the CEACR's attention when reports on the Convention were submitted.

The ILO supervisory bodies, in their most recent General and Special Surveys on aspects of discrimination in employment (ILO, 1996 and 1998b), have not delved into an analysis of affirmative action from the point of view of the notions of equality of opportunity and equality of result. They have not felt it part of their remit to attempt to take sides in the debate of whether special measures should be aimed only at giving all groups a level playing field on which to compete, thereafter leaving the outcome up to merit, or whether they should actually ensure an equal outcome. Commentators on the different systems in place throughout the world, such as Castle (1995), Edwards (1995), Faundez (1994), Hofmeyr (1993), Innes, Kentridge and Perold (1993), Loenan and Veldman (1996), O'Neill and Handley (1994) and Solomos (1989), have written much on the advantages or disadvantages of each approach. Others, like Bacchi (1994) generally and Scutt (1990, pp. 120-123) on the merit principle, argue that the judging of contested concepts should itself be revisited. Management guides on affirmative action also warn of the risk of subjectivity in a blind reliance on "merit" without carefully defining what it means in each enterprise context (see CCH (1990), para. 106). From the international perspective, however, the ILO text (Art. 2) requires a ratifying State "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment ... with a view to eliminating any discrimination" in respect of employment and occupation. The aim is to end discrimination, but the way of doing so is left to each country's discretion.

[44] But Congress is to consider ratification in the near future: see Governing Body document GB.274/LILS/5 (March 1999), paragraph 54.

The CEACR has, however, stated its position on some aspects of both the concept and the way it is applied. For example, it considers that such measures should be designed to restore a balance, and therefore be proportional to the nature and scope of protection needed by the target group (ILO, 1996, paras. 134ff). Once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and still effective. That is as far as the CEACR has gone in assisting the institutions charged with overseeing the legality of affirmative action — the courts — to work within a framework of clearly stated international rules or guidelines on the subject.

The ILO membership, in adopting the Organization's programme and budget, has given support to a number of research projects which throw light on different countries' conceptual and pragmatic approach to affirmative action. The publications of Chari (1994), Davis (1993), Ghee (1995), ILO-CEET (1997), Lim (1994), O'Regan and Thompson (1993), Ronalds (1998), Serna Calvo (1996) and Ventura (1995) all explain, in varying degrees of detail, how affirmative action was introduced and how it works today in countries throughout the world — in Africa, Asia, Europe, North America, South America. The Office has also in recent years prepared a number of training manuals and tools relating to affirmative action in employment, such as ILO (1995 and 1997) and Lim (1996).

Conclusions

Why is it that, as the widely different decisions in affirmative action cases described above show, judges have not been able to agree on some common standards for assessing such schemes? It seemed in the late 1980s that the United States Supreme Court was slowly moving towards a set of principles: that a measure should be proportional to its goal; that affirmative action should benefit only the actual victims of discriminatory behaviour (an argument at one stage rejected, then accepted again); that measures should be tempered by the inclusion of checks and balances, like monitoring and annual changes; and that the type of measure involved was crucial to its acceptability (layoffs from existing jobs being viewed less favourably than preferential hiring and training goals), as was the method by which it was adopted. A decade later, however, the decisions returned to a narrow, strictly juridical reading of the Federal Constitution and the Civil Rights Act to strike down affirmative action. Even in Europe, where strong political and social support for the promotion of women's equality exists, the ECJ came to different conclusions when examining laws attempting to change the profile of the male-dominated public service labour force. The most recent case, together with the political commitment to affirmative action now repeated in Article 141 of the Amsterdam Treaty, shows that the concept has returned to its former popularity with policy-makers. But again, why should affirmative action be struck down in a country like South Africa, where the conditions for such measures exist *par excellence*?

Could it be that, as noted earlier, the very concept of fighting an evil using methods linked to that evil is still too hard to swallow? Or does the answer lie

in the nature of judicial training and procedures generally, with their emphasis on the strict legal reading of texts (as with Judge Rehnquist's dissenting opinions in the United States Supreme Court in the 1980s), or judges' loathing of entering into political issues (as in the Californian case), or their characteristic slowness in accepting changes in social norms (as in the South African High Court case)? Much could be said, also, about the composition of courts, and the need for greater gender and race sensitivity on the bench.[45] Or could it be that the proponents of affirmative action, the practitioners arguing cases and the courts themselves are unaware of the legal concepts that could come to their aid in deciding such matters? As pointed out above, the international law on the subject, in both United Nations and ILO texts, is clear; but bodies such as the supervisory organs of the ILO, whose task it is to evaluate such schemes in the context of international texts on equality, have been timid in coming forward with strong guidance, even if, when given the chance to do so in reports on ratified Conventions, they have commented favourably when examining measures for achieving equal employment opportunities.

Perhaps the available information is not widely applied because it is not widely disseminated. The ILO's structures, particularly its multidisciplinary teams throughout the world, are charged with spreading international developments in relation to employment, but perhaps more programmes could be embarked on with a view to highlighting affirmative action, its strengths and weaknesses, so that a wider public could assess the position.

Yet again, there might be a need for further international action of a normative character. Is the time not ripe for an international labour Convention (and/or Recommendation) on the subject? The ILO, with its tripartite membership and thorough standard-setting procedures (involving representatives of governments, labour and management throughout the preparations, debate and, ultimately, voting on texts by the full membership at the International Labour Conference), provides a solid institutional framework within which such a possibility could be discussed. The procedure for having items considered to be ripe for an international labour standard placed on the agenda of the International Labour Conference has developed in recent years: the Governing Body chooses from a portfolio of possible topics the subject to be worked on for a first debate at the Conference two years later.[46]

This article's analysis of the court decisions of the late 1990s demonstrates that some tighter tests, or norms, are needed for clarity at the national level, for the benefit of not only the victims — or alleged victims — of discriminatory practices, but also the policy-makers who are responsible for eliminating dis-

[45] The ILO has addressed the need for continuing professional development for labour courts by publishing Hodges-Aeberhard (1997) and by organizing seminars for labour courts and tribunals on equality issues, such as those held in Harare for southern African labour courts and in Port-of-Spain for the Caribbean courts.

[46] See, for example, Governing Body document GB.274/3 entitled "Date, place and agenda of the 89th Session (2001) of the Conference", adopted at the Governing Body's March 1999 Session.

crimination in employment. As a minimum, an international labour standard could: (1) define the concept, highlighting the temporary nature of such measures, (2) clarify once and for all that affirmative action is not "reverse" discrimination, (3) outline the limits of its aims, (4) give examples of methods proportional to those aims, (5) provide guidance on the relative claims of individual and group damage, (6) clarify the balance to be reached in respecting/diminishing other groups' rights and (7) take a stand on the egregious nature of the discrimination to be overcome.

Such a text would allow courts throughout the world, whether their countries had ratified it or not, to find inspiration in their judgements on factual situations. From what appears above, they certainly need a helping hand. But, even without an international labour standard on the subject, affirmative action in its many forms is here to stay and courts will have to come to grips with the concept sooner rather than later.

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