Discrimination and the law, with particular reference to recruitment strategies and policies as adopted by various countries. The study focuses on the unique issues presented to South African legislators, with particular reference to the limits of anti - discrimination legislation.

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INTRODUCTION

My investigation within this dissertation is intended to test the ambit of anti-discrimination legislation. I have initiated this investigation by stating what the goals of anti-discrimination legislation should ideally be. We need to know what its goals are in order to ascertain if it if fact has been successful at fulfilling them. Within the context of anti-discrimination legislation, I have tried to expand on why there seems to be so many innate problems, notwithstanding the fact that there are advantages as well.

The role of the Constitution of The Republic of South Africa and The New Labour Relations Act (LRA) of 1995, in terms of their persuasion over anti-discrimination legislation and anti-discrimination measures should not be inflated. Together these Acts have played a significant role in forcing the hand of the legislature as well as the people they govern. Human nature by common cause is such that it does not take easily to remodelling or transformation, especially when it comes to social change. Laws have the power to do exactly that. But the only problem is that you cannot police morality, and therein lies the confines of anti-discrimination legislation. It tries to police morality. But, in order for any form of social engineering to become accepted, it has to have the force of law behind it if it is to gain any reverence at all.

Echoing the words of the Green Paper on Employment Equity, law in South Africa is faced with the daunting and somewhat impossible responsibility of trying to empower the majority. This Green Paper tries to compensate for past racial as well as gender favouritism. This is exactly what our South African form of Affirmative action tries to do. It tells employers that they have to adjust their current employment practices so as to empower persons or members of groups previously disadvantaged. This aim has to be realized with the least possible interference with other rights of individuals as contained in Chapter 2 of the Final Constitution and the LRA. Even if it does interfere, most believe that it should be regarded as justifiable, given our very unique history in terms of the challenges that the majority of South Africans have had to face.

In essence I have tried to exemplify why a right to equality might be limited, without really making reference to the Constitution, yet bearing in mind, those very reasons for limiting the right. What I mean to say is that the Constitution in terms of **Section 36(1)** says that the falling should be taken into account when limiting a right as contained in Chapter 2 of the Constitution:

(a) ***the nature of the right;***

(b) ***the importance of the purpose of the limitation;***

© ***the nature and extent of the limitation;***

(d) ***the relation between the limitation and its purpose; and***

(e) ***less restrictive means to achieve the purpose.***

On that reasoning alone, the whole notion of the compulsory institution of affirmative action policies may be justified. These policies, as we all know is merely a temporary measure and will not have to stay in place indefinitely. According to Professor Rycroft, the whole purpose of law in engaging itself within the arena of discrimination is so that it can somewhat change attitudes gently. But it becomes more apparent from the words that follow, that the law alone is simply not equipped to deal with this dilemma. In making this more intelligible, I have used some academic descriptions of the characteristics of anti-discrimination legislation.

Moving on then, in Chapter Two, I have injected an examination of the qualifier ***"unfair discrimination",*** as contained in section 9(3); 9(4) and 9(5) of the Final Constitution. The significance of these provisions relate to the fact that not all forms of discrimination is proscribed, only the forms when such conduct is regarded as unfair. The importance of the Labour Relations Act of 1995 extending its protection to job applicants, deserved some attention as I saw it. What this in turn has meant is that the qualifier that is contained in the Constitution will have ramifications for every stage of the job recruiting process.

My investigation then takes on a Constitutional exploration. I have tried to dissect the Equality provision as contained in the Constitution , with the intention of stressing the importance of promoting a culture of Equality of Opportunity within the recruitment process,

and most importantly within the working environment once you are in fact employed. The jurisprudence of both America and Canada have been very encouraging in the way that they deal with the whole idea of equality. Canada, specifically, since many of our Constitutional guarantees have tended to be replicas of, to certain degree. My analysis of the South African jurisprudence in this regard centres on the concept of formal and substantive equality. I have endeavoured to clarify aspects of equality within the practicals setups that we encounter every day. At this point in my investigation I tended to provided a fairly comprehensive interpretation of the Constitution and its contribution to the protection of the Right to Equality.

Thereafter, I discuss the differences between Direct and Indirect discrimination. I deemed it imperative, because in most cases discrimination might not appear in patent sense, in fact one has to very often sift through legislation with a fine toothed comb to finally see the impact that such a law is having on the people that it governs . It is this type of discrimination that disturbs one the most, since it is brought about in a very insidious and in most cases, guarded manner. This brings me to the notion of the ***"disproportionate impact"*** of ceratin practices, rules or regulations as the case might be. There are cases in which a specific test for example, has a significantly different ***"impact"*** on certain members of a group than it does on others. On a casual perusal it might not be clear at first, because these laws usually materialize in a fairly neutral way. Regardless, the practical implications of that very practice , show clear motives of unfairness. But then what can we do about it?

My objective in presenting this dissertation has been purely to offer my understanding of interviewing techniques, testing, and the use of law in terms of recruitment within the Labour Market. I am hoping that I clearly pinpointed how and why I think that the once of Face-to-face interview seriously lacks credibility. I have instead advocated policies that I think are more favourable in the light of the LRA and the Final Constitution. My policies centre around social factors as well, besides insisting on a more transparent recruitment system.

It is my strong contention that transparency in the whole process of recruitment will eliminate a lot of controversy when it comes to this arena. It would ensure that a proper system of

checks and balances exist between an employer and a future employee. In that way the balance of power would not be in the hands of the employer as it used to be. Once there is an equal bargaining position, the need to resort to the legal process as a method of redress will be severely diminished.

At the expense of sounding repetitive, my concerns centre around the following issues:

[1] What is the purpose of legal intervention against discrimination;

[2] Is subjective prejudice susceptible of legal sanction?;

[3] In an era of de-regulation - of freeing business people from legal restraints, how can one justify the imposition of non-discrimination provisions?;

[4] Is there anything wrong with a Chinese Restaurant only hiring Chinese waiters? Or a Portuguese bakery only employing Portuguese bakers? Or a firm that markets men`s clothing to only hire men?;

[5] A discussion on what the legitimate defences to discrimination are if any;

[6] How can employers improve their IR strategies while simultaneously increasing productivity and efficiency.

My aim is to try and present arguments in favour of using informal methods of controlling the work environment. It seems to me, that the most favourably way of achieving a productive environment between employer and employee is where employers in each circle of employment work toward a system of socio-legal codes of practice and behaviour. I will hopefully show that this might in fact be the only successful way in which the entire problem of Discrimination within the working environment may be approached.

CHAPTER : 1

Anti - discrimination legislation

In declining order of importance, the goals of employment discrimination law should be:[2]

[1] eliminating all bias and arbitrariness from the workplace, especially with respect to employee selection, promotion, and allocation of benefits;

[2] limiting employment decisions to accommodate criteria that are essential to job qualification;

[3] encouraging individuals to pursue their chosen occupational goals without the risk of encountering employment criteria unrelated to job performance;

[4] enabling employers to hire, promote, and reward the best available employees, by focusing only on those selection criteria that are integral to job performance;

[5] facilitating the development of more ergonomically and psycho socially accommodative work settings;

[6] enhancing occupational mobility, so that labour allocation maximizes social welfare, by enabling every worker to conveniently obtain the employment which maximizes his happiness and productivity;

[7] optimizing the efficiency of selection procedures;

[8] minimizing the social costs of employment discrimination litigation;

[9] facilitating optimal resolution of employment discrimination disputes; and

[10] eliminating retaliatory treatment toward employees who complain about employment discrimination.

DISCRIMINATION IN THE LABOUR MARKET

Economists define labour market discrimination as arising when employers make decisions about employees for reasons that are not related to genuine work requirements.

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[2]. See generally Internet articles: http: // www . hackney . gov. . . . struction / equalopp . html and http: // www . soe . bcit . bc . . . . g/mine 2099/emp_resp.html

Discrimination appears most obviously when an employer focuses on irrelevant personal characteristics instead of work performance or merit. Thus, in many organizations, women or Black people must still work unusually well to gain a promotion. The Constitution spells out a range of criteria that employers may not generally use in making employment decisions - sex, race, religion, and so on.[3] The only exceptions occur when an employer is explicitly aiming to overcome disadvantage arising out of past discrimination.

THE IMPACT OF INEQUALITY

Massive inequalities in income and status affect social cohesion, undermine efficiency and economic growth, and have a devastating impact on families and individuals. Clearly, South Africa cannot sustain any inequalities related to race and gender at the level it currently suffers. They have contributed to high levels of social unrest and crime, which in turn has undermined growth and development. Extreme inequalities also affect the economy directly. They are associated with inefficiencies in the labour market and consequently throughout the economy. In addition, they have prevented the growth of the middle class, which has stunted domestic demand and human resource development. Apartheid policies led to allocative and technical inefficiency. They marginalised large sections of the labour force, preventing them from engaging in directly productive and sustainable economic activities either as employees or as self employed individuals.[4]

This is a plain waste of resources. Apartheid policies also artificially reduced the cost of the labour of the majority, and increased the cost of employing a favored minority. As a result, employers faced higher costs for skilled and supervisory workers, while having little incentive to improve the productivity of unskilled labour. Consistent inequalities in incomes by race and gender were associated with an unusually skew distribution of income. As a result, poverty and inequality in South Africa prove worse than in most Third World countries at a similar level of productivity. Measures for employment equity will contribute to alleviating

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[3]. The Constitution of the Republic of South Africa Act 20 of 1995, as seen in section 9. See also Internet site : http: //www. law . cornell . edu / topics / employment_dsicrimination . html.

[4]. Http: //www . mbendi . co . za / werksmns / wkemp - 01 . Htm # 3., see also article entitled: " *Employment Werks (Extracts)* At Internet site http: //www . Polity . Org . Z . . . reen _ papers / equity . html.

inequalities only as part of broader strategy of reconstruction and development. For one thing, inequalities in race and gender do not arise solely or even primarily because of discrimination in employment.

THE POTENTIAL AND PROBLEMS OF ANTI-DISCRIMINATION LEGISLATION

At this point of our evolution as a nation faced with enormous challenges of people development, elimination of poverty, hunger an unemployment, it is important that this areas of policy making be approached carefully. Unlike the rest of the world, South Africa is faced with a unique challenge; one of majority empowerment. It is important that we realize that it is not enough to simply say that the gates of opportunity are open to all equally. All our citizens have to have the ability to actually walk through those gates. Pivotal to this whole dilemma therefore, is our ability to establish equality as a fact and as a result. The proposals in the Green Paper on Employment Equity are based on an understanding of the limitations of affirmative action as applied elsewhere in the world and as was transplanted into SA.[5] It is against this background that the debate has to be shifted to focus on a new vision of equity beyond affirmative action, which is but a means to an end.

The Green Paper states that the proposals contained in it are intended to help compensate disadvantages emanating from past racial policies and, as far as possible, ensure the accommodation of differences between people in the workplace.[6] They are intended to find a statutory base for affirmative action in employment. It states further that measures to achieve employment equity will necessarily reflect an analysis of the nature and extent of discrimination in the workplace and its relationship t past discrimination outside the labour market. The key elements of employment equity envisaged in the Green Paper are the eradication of unfair discrimination of any kind in the workplace and measures to encourage employers to undertake organizational transformation to remove unjustified barriers to employment for all South Africans. Such measures are intended to accelerate training and

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[5]. Http: //www . Polity . Org . Z . . . reen_papers / equity . Html. See also Employment and Occupational Equity Policy Proposals, Government Gazette no. 1703, Part 2 of 2, vol 373. 1 July 1996. Notice Number 804.

[6]. Ibid.

promotion for individuals from historically disadvantaged groups: Black people, women and persons with disabilities.

The Green Paper sets out proposed measures designed to achieve employment equity. It also proposes that disputes about employment equity be referred to the CCMA (A body established in terms of the LRA[7]) and then to Labour Court. It is proposed in the Green Paper that employers be prohibited form using recruitment and selection methods and criteria which discriminate unfairly and that advertising mechanisms that avoid neglecting historically disadvantaged groups be developed.

Proposals in the Green Paper concerning selection criteria include the following:

* employers should review their criteria for hiring, training, transfers, retrenchments and promotion to ensure that they do not discriminate;
* employers should define criteria in terms of skills rather than formal educational requirements;
* where a company has historically employed few people from disadvantaged groups seniority within the company may be a discriminatory criterion;
* employers should avoid psychometric tests unless they can demonstrate that they respect diversity;
* language policies may unnecessarily limit access by historically disadvantaged groups;
* redefining grades may be necessary;
* standard selection criteria may be considered discriminatory as last in first out (LIFO) practices may perpetuate past disadvantages.

The Green Paper proposes that the Department of Labour be responsible for achieving compliance with the proposed legislation and that codes of good practice be developed. A Directorate for Equal Opportunities will develop codes of good practice and a Labour Inspectorate will undertake monitoring and enforcement activities. While acknowledging and appreciating the intention behind the proposals of the Green Paper on Employment Equity,

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[7]. Labour Relations Act 66 of 1995.

and the mechanisms toward the implementation of such proposals, there are several important considerations that have been omitted namely:

1. The lack of reference to quotas and time frames as minimum standards or guidelines for the realization of employment equity (the same concerns have been raised by the Foundation for African Business and Consumer Services **[FABCOS]**, the National African Federated Chamber of Commerce **[NAFCOC]** and Kennedy Murire, Director Of Product Development Laboratories.

[8]

2. The submission of employment equity plans to the Minister of Labour by employers in some categories is problematic. There seems to be a grey area when it comes to an identification of what these categories would be, furthermore, the criteria for the determination of these categories is also unknown. The provisions on the submission of equity plan could be constructed to mean that the implementation of employment equity, will to a certain extent, be at the discretion and at the pace determined by individual employers. This could have the effect of leaving the realization of employment equity to voluntary action and market forces (See **4.8 and Box 3 of the Green Paper**[9]). According to a report that appeared in the Sowetan 19 August 1996, the results of a survey conducted by Ernest and Young and Insight Customer Satisfaction has 375 companies and employing between 500 and 3000 people reveal that most local companies were reluctant to invest in staff training and contribute less than 2% of there payroll to staff training and development. According to the report, this has contributed to the slow pace in the transformation of Business in SA.

3. The provisions on incentives and sanctions to facilitate effective employment equity are not very clear and specific (See **5.11 of the Green Paper**).[10]

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[8]. See The Star - Business Report- 16 July 1996.

[9]. Government Gazette number 17303, 1 July 1996.

[10]. Gazette number 17303, 1 July 1996.

4. The Human Rights Commission has not been mentioned with regard to the monitoring of the implementation of the employment equity plans. This is particularly strange in view of the provisions of the interim constitution and even the Final Constitution.

The non - referral to relevant international human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women, the Discrimination (Employment and Occupation) Convention and the International Convention on the elimination of all Forms of Racial Discrimination. These treaties are relevant in addressing discrimination. South Africa has ratified the Women`s Convention, has signed but not ratified the racism Convention and has not yet signed the Employment Convention.[11]

The primary objective of a constitution is to limit the power of government and regulate the institutions of govt. It is for the institutions of govt to attend to the ordering of the private affairs of the people. Thus if private discrimination is to be prohibited, the parliament should pass a law prohibiting this practice.[12] Those in favour of horizontality argue that the reality in modern society is that the exercise of private power poses as great a threat to the enforcement of fundamental rights as does the exercise of public power. It is thus illogical to subject the exercise of public power to constitutional scrutiny whilst ignoring, in the constitution, the exercise of private power.

THE POSITION IN THE UNITED STATES OF AMERICA

Americans are faced with the dilemma: To what extent may Congress "appropriately" enforce the Fourteenth and Fifteenth Amendments by ***"proscribing conduct which the court would not construe to be 'state action' ".***[13] The Americans believe that Congress has at least some latitude, in that certain types of private conduct which the court would not construe to be state action. For instance, if there is a situation where private conduct prevents state officials from giving equal protection or due process to others. Similarly, private conduct, which

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[11]. See article: *"Explanatory memorandum "- Compliance with Constitutional Principles at site :* Http: //www . Constitution . . . afts / tdrafts / 2equal . Htm.

[12]. RWDSU v Dolphin Delivery 1986 (2) S.C.R. 573 CANADA.

[13]. Emanuel Law Outlines on Constitutional Law, 1996 - 1997. 14th ed.

intentionally interferes with rights guaranteed to an individual by federal constitutional provisions other than the Fourteenth Amendment may be barred by Congress.[14] The grey area in this regard seems to be to what extent may Congress prevent **purely private discrimination** by one individual against another, where no state facilities, programmes or rights are involved.

Initially it was decided by the in the civil rights cases that only state action could violate the Fourteenth Amendment, Congress' enforcement power only permitted it to restrict state action, and not private conduct.[15] Under the logic of the *Civil Rights Cases* (though this was not made explicit), Congress did not even have the power to prevent one private individual from forcibly blocking another's exercise of the right to vote in state elections, the right to attend public schools, or other exercises of state rights.[16] Such private conduct would presumably be in violation of state law, but would not itself be a violation of the "equal protection of the [state] laws;" only action by the state could be that. And Congress' enforcement power was limited to enactment of statutes which were needed to prevent the state from abdicating its equal protection obligations.

This exceedingly narrow view of congressional power under the Fourteenth Amendment, was not re-examined until the 1960's. Then, in *U.S. v. Guest*[17], six members of the Court stated that Congress could, under **section 5** of the **Fourteenth Amendment**, reach a substantial range of ***privately racially discriminatory conduct***. But since three Judges did so in one concurring opinion and the other three in another, *Guest* did not produce a single majority articulation of the scope of Congress' right to reach private conduct.

The *Guest* case concerned a prosecution for criminal conspiracy under 18 U.S.C. **s241.** The

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14. Ibid on page 456.

15. See article entitled : *"Congressional enforcement of Civil Rights"* - In : Emanuel Law Outlines, Constitutional Law . 1996-1997., or at site : http: //www . Emanuel . Com.

16. Ibid

17. 383 U.S. 745 (1966).

defendants were private individuals. The first count of the indictment charge them with conspiracy to interfere violently with the right of several blacks to use state-owned facilities; the second count charged them with conspiring to interfere with blacks's rights to travel in interstate commerce (into and out of the state of Georgia).

The opinion for the Court, written by Justice Stewart, avoided deciding **s241** could constitutionally be applied to racially discriminatory, but entirely private, interference with the use of public facilities (the first count). It did so by pointing to the possibility that the indictment might be claiming, although ambiguously, that **state officials participated** in the interference. But in considering the second count, Justice Stewart concluded that **purely private interference with the federally-guaranteed right of interstate travel** was constitutionally reachable by Congress, since the right was "fundamental to the concept of our federal union."[18]

Stewart's disposition of the interstate travel count remains significant today, since it establishes that Congress may proscribe private conduct that satisfies two requirements:

[a] such conduct be racially motivated; and

[b] it be committed with the intent to deprive the victim of rights guaranteed by the federal constitution.

Similarly, in South Africa parliament may use the above two rules to step in and create legislation if the above criteria are met .

Six Justices, in two concurrences, were willing to go further. They thought that the first count of the indictment (conspiring to interfere with another's use of state -owned facilities) was also constitutional. One concurrence by Justice Clark, reasoned that " the specific language of **s5** of the Fourteenth Amendment] empowers Congress to enact laws punishing all conspiracies - **with or without state action-** that interference with Fourteenth Amendment rights." Justice

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18. Supra.

Brennan on the other hand seemed to deal with the perplexity in a more logical fashion. He believed that **s5** gave Congress the power to make any law which it concluded was **"reasonably necessary"** to protect a right created by and arising under the Fourteenth Amendment. Consequently he would apply the same standard as applied by Chief Justice Marshall in **McCulloch v. Maryland**, in interpreting "the necessary and proper" Clause. Justice Brennan is of the opinion that Congress could reasonably have concluded that prevention of ***private interference*** with the access to state-owned facilities was a reasonably necessary means toward preventing **governmental** interference with that access. In fact, he believed that Congress could punish all conspiracies that interfered with Fourteenth Amendment rights, even if no state officers were involved. This I believe is how the South African courts should or rather could effectively deal with the whole concept of anti-discrimination legislation.[19]

Let us for argument sake, assume that the Clark and Brennan concurrences in *Guest* collectively represent currently valid doctrines, it is still not clear how far the rationale of these concurrences extend. The easiest cases are those in which Congress prohibited private individuals from ***directly interfering with state officials attempts*** to furnish equal protection of due process. Here, very few people will disagree that Congress has the right to take action. Take for example an individual trying to prevent a local school board official from carrying out desegregation orders, Congress would have the right to punish such an individual,[20] furthermore, federal courts have similar power to bar private interference with desegregation.

Now, suppose that the ability of **A** (a private citizen) to use facilities, or otherwise receive the benefits of equal protection and due process, is blocked by the conduct of **B** (also a private citizen), where **B's** conduct is directed at **A,** and not at any state official as in the preceding paragraph. For instance, assume that **B** threatens to beat up **A** if **A** attends a recently-desegregated school. Even though **B** has not directly prevented a state official from granting equal protection or due process, he has frustrated **A's** ability to receive the fruits of those

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19. Emanuel Law Outlines - Constitutional Law 14th ed. Chapter 13 [page : 458].

20. Brewer v. Hoxie School District No. 46, 238 F . 2d 91 (8th Cir. 1956).

rights. Accordingly, it seems quite apt that here, too, Congress is sanctioned by the constitution, to punish (or establish liability for) such acts by **B**, under **s5** of the Fourteenth Amendment.

THE POTENTIAL AND PROBLEMS OF ANTI-DISCRIMINATION LEGISLATION

Anti discrimination legislation requires individuals to act in a manner different from how they would have preferred to act on pain of some sort of sanction[21]. According to Lustgarten, the law may not and cannot be used to extend to racial disadvantage because no one can be held formally responsible. In order for a law to be truly effective, one needs an identifiable defendant to whom blame may be imputed.[22] There are tight limits to what legal regulation can reach; at least some formally articulated or reasonably clear policy is required.

In terms of the definition of discrimination, it is the **"antithesis of individualized decision"** .[23] He contends further that people might be treated illy or might share some social circumstances due to his or her involuntary membership of a group. This implies that to every discrimination case the presence of a collective dimension is inevitable, this in turn is difficult to fit within the traditional processes of the law. According to the English law, adjudication has conventionally been proceeded by **`individuation'.**

The law demands that we should be very clear in our contentions. In the case of a discriminatory practice, it is not enough to ague that the defendant is within the broad policy canvass or spirit of the legislation. There would be a huge onus on the complainant in these circumstances. Within the legal process, we find that there are various rules and procedures that have to be followed eg:

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[21]. Lustgarten Supra 1986.

[22]. B. Hepple: *"A right to work?"*, 1981 10 ILJ 65 , 82. and L . Lustgarten, *'Racial Inequality and the Limits of Law'*, 1986 49 MLR 68,84.

[23]. Ibid and see also generally, C. McCrudden, *'Law enforcement by Regulatory Agency'*: Employment Discrimination in Northern Ireland. 1982 45 MLR 617.

[1] Technical rules of procedure specified by statute or rule of court;

[2] Judicial notions of appropriate procedure.

Each formal investigation has to include terms of reference, which the House of Lords have held to be based on specific evidence, and without such evidence the investigation was without statutory authority. The law is only supposed to impose minimum standards, compliance is satisfied by strict adherence to the letter, and it is perfectly legal to do nothing more. If we place too much emphasis on defining minimal standards, and minimum compliance with these standards, might hinder the development and the implementation of creative measures aimed at solving the **"ultimate"** problems faced by victims of discriminatory conduct. Legal regulation of rights in actual fact works against victims in that it tends to impose constraints which gain there force from the fact that non compliance shall be dealt with via strict penalties.

According to Rycroft, the purpose of the law in trying to intervene in the field of discrimination, is to **"deflect, minimize or change attitudes and behavioral patterns".**[24] A stark reality as enunciated by Lord Wedderburn, however, is that subjective prejudices are not easily capable of legal sanction in the real world.[25] Lusgarten adds support to this view and asserts further that we must not build up ***" an exaggerated faith in the efficacy of the law".***[26]

Similarly, in America, civil rights laws have to a greater extent been a failure. Although formal changes have taken place, substantive changes have been minimal. In the famous case of *Brown v Board of Education,*[27] the initial threads of abolishing racial discrimination were sewn. The case declared that discrimination had now become illegal, but what did it mean to people who belonged to that group? To these people, with this came the expectation that there will in addition be some significant change in their living conditions. In order to give

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[24]. Rycroft, A. *'Unfair Discrimination in Employment'*, 1990, p372.

[25]. Lord Wedderburn *The Worker and the Law* 3 edn (1986) 447.

[26]. Lustgarten, Supra.

[27]. 98 LAW . ED . U.S. 873.

true content to the law of illegalizing racial discrimination, it would have to include significant changes to living conditions as well [the past practices of segregated schools; lack of jobs; the least desirable jobs; lack of political power]. Results are what is really crucial, instead, we have a body of anti discrimination legislation that makes results largely irrelevant.

Brown`s case simply set free various ideas and expectations, raising ambiguities that were to be resolved at a later date. However separate its origins and historical practices may be, racism in America has to be confronted today within the context of contemporary American capitalist society. The problem is how to connect a unique history with a complex present. In *Brown`s* case the court concluded that **"laws aimed at requiring cessation of white conduct deemed harmful to blacks are hard to enforce because they seek to police morality"**.[28] There is nothing in the American constitution that authorizes the regulation of what government at any particular time would deem appropriate `moral' behavior in any event.

In English law has expanded the ambit of legal remedies in discrimination cases, and also increased the number of protected classes.[29] This had meant that the available resources needed to process claims in a sensible and orderly fashion has diminished under demanding administrative burdens. The backlog of unresolved cases increased from 49,000 to 73,000 during 1994 alone.[30] There is no one civil rights movement anymore. Each of these groups have transformed themselves into special interest groups and act less like the vanguard of a universal moral movement. McAdams advocates many reasons for the vigorous enforcement of anti-discrimination laws.[31] He claims that cooperation between individuals can be improved by social norms and practices that use group membership and affiliation. Part of his strategy is that the individual self esteem of group members should be encouraged by effectively reducing the relative status of rival groups.

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28. Bell, D : *"An allegorical Critique of the United States Civil Rights Model", 1996.*

29. See generally C. McCrudden, *'Law Enforcement by Regulatory Agency : Employment discrimination in Northern Ireland'* (1982) 45 MLR 617.

30. Epstein RA: *"The status-production sideshow: Why the antidiscrimination laws are still a mistake", 1995.*

31. Ibid page 1090

Professor Owen Fiss also believes that the ambit of antidiscrimination legislation seems to be really confined :

> "The limited nature of this legal strategy is not just a function of the circumstances of politics but rather reflects a deep commitment to the values of economic efficiency and individual fairness. The most troublesome question is whether the historical legacy of the class, will or should, moderate that commitment so as to yield, through enactment or construction, a more robust strategy for the law. The legacy supplies an ethical basis for the desire to improve the relative economic position of blacks, and yet it also explains why a law that does no more that prohibit discrimination on the basis of race will leave that desire, enlarger part, unfulfilled "[32]

Similarly it can be seen that in South Africa, the dominant white group has in the past seized upon such practices to create a solidarity that has worked against the interest of excluded groups. He claims that the unfortunate out come can only be countered by effective anti-discrimination laws that roots out these practices. As it stands this approach tends to have its advantages in that if we had anti-discrimination legislation, people would still hold on to their subjective beliefs, but The presence of such legislation might serve as a deterrent against people actually acting out on these subjective prejudices.

Looking in on the broad society one has to decide how to address the problem of inequality in the workplace or in general. We have a constitutional democracy which has at present huge chasms between the 'haves' and the 'have nots'.Therefore, you need to provide incentives by govt which would encourage non discrimination without the practical burden of anti-discrimination legislation. McAdams believes that anti-discrimination legislation tends to prevent unfortunate social outcomes, and therefore emphasizes the importance of all civil rights.[33] It is his firm contention that people acting privately, uncoersed, bring about unsuitable social outcomes which could very competently have been solved by the presence or creation of "well-crafted" anti-discrimination legislation. He goes on to add that this may result in covert practices giving rise to an impermissible pattern of racial discrimination.

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32. Fiss, O. *'A theory of Fair Employment laws'*, 1971

33. McAdams in Epstein (Supra) page 1088

McAdams, in the projection of his view, expounds a two stage analysis (he limits himself to discrimination against blacks). By way of introduction he proceeds by borrowing from the experiences of the game theory, which advocates that cooperation between individuals can be improved by social norms and practices that use group membership and affiliation.[34] Under this strategy, the self esteem of an individual is encouraged, often by reducing the relative status of members of rival groups.[35] He illustrates this point and it's usefulness, by drawing on the example of how the white dominant group has in the past seized an opportunity such as the one at present, and have managed to create a solidarity which effectively have kept out the excluded groups. This quandary he professes, can only be elucidated by an efficacious anti-discrimination law that would counter such practices. "In his view the status-production function of discrimination exerts so powerful an influence that it alone is sufficient to maintain destructive racist practices ...."[36] His final analysis leads to the proposal that in deciding whether or not to retain civil rights laws, one must by necessary implication, involve oneself in an inquiry as to whether the benefits outweigh the costs.

Epstein finds shortcomings in this analysis. He says that McAdams correctly acknowledges the fact that all groups would have access to status-production techniques. His problem lies in the fact that he underestimates the effectiveness of these techniques as a counterweight to the activities of any dominant political group. His position is clear: As long as all people concerned have access to the same techniques, there is no reason why any faction cannot attain nor maintain a cartel. It is contended that the foremost task that we have to indulge in, is to try and depreciate the level of public force in the arena of human activities and/affairs. This accordingly can effectively only be attained by ***repealing*** and ***not enforcing*** civil rights laws.

It seems to be common cause that if people are bound by contract (ie via legislation in place), then their own tenancies for self gain would be greatly curbed, since legal intervention could

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34. Ibid on page 1090.

35. See McAdams, supra note 9, at pp 1021-23

36. McAdams in Epstein supra, at p 1091.

be used as a tool in the instance of a breach arising. By having contracts in place, we reduce the costs involved in trying to deal with a person who is in breach. "And when contracts cannot be formed because of high transaction costs, the imposition of reciprocal obligations by legislation can provide similar forms of assurance".[37] People will not become insecure about competing for resource etc, because they can rest assured that all parties would be subject to constraints as imposed by the legal system. This strategy whereby all parties are subjected to the very same constraints, seems to be the most favorable outcome for all concerned.[38]

McAdams has problems dealing with the point that people would cooperate with each other even though they do not have to face any sanctions for defection. Further, he argues that in many instances, informal practices that people observe in daily activities generally rule out the possibility that some private individual might in actual fact defect. By way of explanation he concedes that as soon as people thoroughly understand the impact of their actions on others, they are less likely to act in a self-indulgent manner, and less likely to deviate from cooperative social solutions. This strategy however seems to be rife with difficulties since it seems to justify antisocial behavior that might be directed at outsiders to the so called group. In the end it boils down to the fact that one should not place too much emphasis on the significance of non-constraining and non-pecuniary stimulants such as altruism and status, because without the sticks of discipline and force, success would be attained only in theory and not in practice.[39] Harsh sanctions are an absolute must when it comes to effective strategies.

Against a backdrop of centuries of discrimination, anti-discrimination laws are perpetuating discrimination, rather than eliminating it,[40] and may exacerbate inequality.[41] Irrespective of the professed benign motive of any programme, it has to be inclusive rather than exclusive in

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37. Epstein at page 1092.

38. See generally Michelle O' Sullivan, *'Theory and practice of Judicial Equality in South Africa'. 1994.*

39. McAdams in Epstein, Supra, p1094.

40. Fullwider (1980) pp 171-172.

41. Albertyn and Kentridge J. (1994) P152.

its operation, otherwise it may amount to reverse discrimination.[42]

This was clearly seen with particular reference to the case of affirmative action in the American decision of *Bakke v Regents of the University of California*[43] where an affirmative action programme was regarded as unconstitutional because it operated to exclude absolutely, applicants from the majority group. So anti discrimination legislation may be said to only advantage those who in actual fact, are in a disadvantaged position, together with the fact of his/her race or gender which serve merely, as indications/presumptions of discrimination.

Catherine O' Regan has some interesting assertions in terms of legislation that affects the status of women. She acknowledges that women are clustered in low status jobs where there earning power is commensurate with their status and therefore amounts to very small salaries.

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42. Ibid.

43. 438 U.S. 265 (1978).

Her rationale of this situation is that employers have always discriminated against women, furthermore, their has always been a sexual division of labour in relation to housework and child care.[44] The fact that women in most instances have responsibilities both at home and at work, has made it increasingly difficult for them to operate equally in the formal employment sector. Within the formal employment sector is a system that is tailored around the "male" worker. So, whilst changes are welcome, it must be acknowledged that the formal legal recognition of equality will not automatically achieve equality in practice. Positive steps have to be undertaken to ensure that formal legal equality promotes practical equality in women's lives.[45]

The patterns of employment as identified by O' Reagan, have come about as a result of a wide range of complex social considerations. The most important of these considerations is the fact that employers actually reserve certain types of jobs for males, by refusing to appoint or promote women or even train them for it.[46] So there exists this conscious marking between jobs for women and jobs for men. Women therefore become segregated from the male workforce. This however is not the only reason for the subordination of women in the workplace, because women also lack the skills or experience that is necessary for many jobs. This is a direct consequence of them being so heavily burdened with household responsibilities which prevent them from full participation at the workplace. So we can see that right from the beginning, that anti-discrimination legislation, which aims at influencing employer behaviour, is just such a limited strategy when it comes to the promotion of equality in the workplace. Furthermore, anti-discrimination legislation is also limiting in the sense that it is directed at making sure that differential treatment is prevented. This implies that it does not seek to remove disadvantages experienced by disadvantaged groups, which is what it should be attaining as a matter of equity.

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[44]. O' Regan, *"Equality at work and the limits of the law: Symmetry and individualism in anti- discrimination legislation"*, Acta Juridica.

[45]. O' Sullivan, *'Theory and Practice Of Judicial Equality In South Africa'*, 1994.

[46]. Kline, M. *'Race, racism and feminist legal theory'. 1989.*

KEY FEATURES OF ANTI-DISCRIMINATION LEGISLATION: SYMMETRICAL TREATMENT AND INDIVIDUALISM[47]

Anti-discrimination legislation provides remedies for people who have been treated differently or disadvantageously, where the discrimination occurs on a prohibited ground, for example, sex, or color. Before we embark on an analysis of anti-discrimination legislation, we have to acknowledge the comparative right to equality/equal treatment.[48] This implies that the rights of members of protected groups are to be determined by reference to the rights of others. Ant-discrimination legislation is expressed in neutral terms. Prima facie, according to its language and gammer, it claims to protect white people and men as much as it protects black people and women.. This attempt at even handedness focusses concern on differential treatment of individuals.[49]

Legislation therefore is weak, in terms of successfully changing patterns of social behavior. The first principle of anti-discrimination legislation is that it is symmetrical and therefore favors the imposition of symmetrical treatment on all people alike. This means that women should be treated as men are treated and, conversely, men should be treated as women are treated.[50] The second principle of anti-discrimination legislation is individualism: relief is afforded to individuals or groups of individuals who can show that they were disadvantageously treated. Each of these principles upon which anti-discrimination legislation is conceptually based creates difficulties for the promotion of equality for women.[51]

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[47]. O Regan, Supra. Page 66.

[48]. Ibid.

[49]. Ibid.

[50]. Ibid on page 66.

[51] O' Regan, Supra.

THE PROBLEM WITH SYMMETRICAL TREATMENT [52]

Anti-discrimination legislation requires protected groups to be treated in the same way that others are treated. When we speak within the context of sex discrimination, we are saying that women must be treated in the same way as men are. *Prima facie* this might seem like a fairly equitable solution, however, should you attempt a practical application of this exercise you will encounter two problems. Firstly, men and women are not the same, for example in relation to childbearing, it is difficult if not impossible to determine what treatment will be symmetrical.[53] Secondly, by the law placing so much emphasis on symmetrical treatment, ***impact*** is given little if no attention at all in the grand scheme of affairs. This prevents a consideration of the impact of a discriminatory provision, which in essence is the key social problem that needs special attention. In both of the mentioned cases, the symmetrical nature of anti-discrimination rights fails, because symmetry is inappropriate.

Anti- discrimination law requires a women to show that she has been treated less favorably than a male in a similar situation.[54] What most commonly occurs in the case of anti-discrimination legislation, is that a disadvantaged women will not be able to find a similarly situated male. The classic example would be pregnancy. The forerunner in terms of our law of anti-discrimination, ie Britain and America have themselves struggled to make a determination as to whether discrimination on the grounds of pregnancy constitutes sex discrimination. In *Turley v Allders*,[55] the Employment Appeal Tribunal (EAT) held that the dismissal of a women because she was pregnant did not constitute sex discrimination, as there was no male comparator who was treated more favorably.[56] A route out of the problem is to argue that temporarily disabled men are an adequate comparator for pregnant women; but this has been rejected by the American Courts.[57]

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[52]. O'Regan : *"Equality at Work and The Limits of The law"*. Page 67.

[53]. See also in the regard O'Sullivan 1994, Supra.

[54]. Section 1(1)(a) of the British Sex Discrimination Act 1975.

[55]. (1980) ICR 66.

[56]. This approach was overturned by the EAT in Hays v Malleable Working Mens Club (1985) ICR 703 (EAT).

[57]. O'Regan, Supra note 26.

This problem of Anti-Discrimination legislation goes far deeper than pregnancy. The whole arena of anti- discrimination , legislation is grounded in the Aristotelian concept of equality.[58] According to this theory likes should be treated alike, and those who are different should be treated differently in proportion to their likeness or difference[59]. This has in turn led to the adoption of the 'similarly situated' test in the equality jurisprudence of the United States and Canada.[60] This test basically advocates that people alleging inequality have to show that they have been accorded worse treatment than another person in a similar situation.[61] This test was proved to be insufficient because it does not supply criteria by which to judge:

(a) when a person is similarly situated and with whom;
(b) when a person should be treated in the same way, or differently; and
(c) what kind of different treatment is appropriate.[62]

Furthermore, this test has failed in its attempt in distinguishing between legitimate and illegimate legal differentiation. A further problem with the 'similarly situated test is the fact that a victim would have to show that there is a male who has been more favorably treated. Therefore, it is only a few women who are in the unique position of being similarly situated to men, in terms of their position within the hierarchy who can benefit from anti-discrimination legislation. And Catherine Mckinnon states:

"The more unequal a society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the less likely the difference doctrine (for example, anti-discrimination legislation) is to be able to do anything about it."[63]

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[58]. Aristotle *Ethica Nichomacae* Book V.3 at 1131a-1121b; as quoted in Peter Westen "The empty idea of equality", -In : Harvard Law Review, vol 95 at p543.

[59] Supra at note 58.

[60]. Albertyn, C. And Kentridge, J., 1994, at page 153.

[61]. See J. Tussman and J. Tenbroek "The Equal Protection of the Laws", - In : California Law Review, vol 37, p341. (1949); PW Hogg Constitutional Law of Canada, 3ed (1992) 52-14 to 52-15.

[62]. Hogg, supra, at 52-14 to 52-15.

[63]. *C McKinnon. In* ***Feminism Unmodified: Discourses on Life and Law*** (1987) 37-38.

Women in South Africa very rarely use the unfair labour practice definition in the Labour Relations Act to challenge discrimination.[64] It has also been a strong contention that gender equality has not been at the top of the list even within Trade Unions.[65] South Africa has been characterized by a society which is grossly unequal. Just like how Black workers would rarely be able to find similarly white workers upon whom to base a claim for discrimination, black female workers would rarely be able to find similarly situated white female or Black male workers upon whom to base a claim of discrimination.[66] In some cases courts have tried to assist women in that they have allowed them to prove discrimination by using a hypothetical comparator.[67] But even this may prove to be incredibly difficult since she will have to persuade the court that the hypothetical male would have been more favorably treated than she has been. It is only within the context of pregnancy that the courts have been willing to accept that a hypothetical male would have been more favorably treated.[68]

As a general principle we can say that anti-discrimination legislation requires symmetrical treatment. Basically giving rise to the fact that the focus of the law is on treatment the rather that the impact, which in turn raises a further difficulties. Firstly, "it is possible to use as the basis for differentiation an apparently neutral criterion, which in fact impacts differently on protected groups; and secondly, programmes which are aimed at treating protected groups differently in order to overcome historic patterns of disadvantage will not be symmetrical treatment."[69]

Within the context of anti-discrimination legislation, symmetrical treatment of employees is required by law. *Prima facie,* this might appear to be neutral, but in fact it might affect one

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64. O'Regan, Supra, page 69.

65. For a report of a survey of trade union attitudes to gender equality, see C. O' Regan & C Thompson: *"Collective Bargaining and the Promotion of Equality:* The case of South Africa". (1993).

66. SACAWU v. Sentrachem (1988) 9 ILJ 410 (IC).

67. See also Reaney v Kanda Jean Products Ltd (1978) IRLR 427.

68. Webb v. EMO Air Cargo (UK) Ltd (1993) ICR 175 (HL).

69. *O'Regan Supra at page 70.*

group differently than it would the other. In America the wording of Title VII is narrow, despite this fact, the Supreme Court of America has held that such a requirement constitutes a breach of an employer's obligations in terms of the law, unless the employer can show that it was necessary to impose such a requirement.[70] Chief Justice Burger ruled that: *"the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."*[71] In terms of sex discrimination, plaintiff's generally bear the onus in showing that the proportion of women who can comply with the requirement or condition is smaller than the proportion of men, and the evidentiary requirements become far too onerous. [72] The effect of indirect discrimination provisions, however, to focus anti-discrimination legislation not only on differential treatment but also on the impact of employer conduct in certain cases. This appears to be a significant step in the right direction in terms of the scope of anti-discrimination legislation. In Britain however, obtaining compensation for discrimination requires proof of intent in indirect discrimination cases.

I have already discussed that anti-discrimination legislation focuses on treatment, and not on impact. A further difficulty in this regard is the fact that it prohibits different treatment. In certain instances different treatment is exactly what the disadvantaged might need in order to favor them and undermine systemic disadvantage. A focus on impact rather than treatment may legitimate such programmes. American Courts have constantly encountered difficulty as to whether affirmative action programmes voluntarily adopted by employers, constitute unlawful discrimination in terms of Title VII (and the Constitution).[73] Two cases have held that they do not, provided that: the affirmative action plan is designed to address manifest racial (or other) imbalances; it does not unnecessarily trammel the interests of other employees; and that it is a temporary measure.[74]

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70. Griggs v. Duke Power Co 401 US 424 (1971) – The case concerned a condition which had an adverse impact upon black people.

71. Griggs Supra at page 431.

72. Sachs,A and Wilson JH. SEXISM AND THE LAW. 1978.

73. Contractors Association of Eastern Pennsylvania v. Secretary of Labour 404 US 854 (1971).

74. US Steelworkers v. Weber 443 US 193 (1979).

Anti-discrimination legislation is designed to prohibit blameworthy conduct. This means that only legally blameworthy conduct as seen as seen as being worthy of payment of compensation via the legal system. The blameworthiness of the conduct is tested in anti-discrimination legislation in two ways.[75] Firstly, in some jurisdictions, the plaintiff must show intention to discriminate and, secondly, respondents may be allowed to argue that their conduct was justifiable. On perusal of Title VII we find that it does not expressly state that an applicant must prove intention. Their Constitutional jurisprudence has influenced the US Courts into the finding that direct discrimination involves an element of intention.[76]

It is a well known fact that direct evidence of intention is hard to obtain, therefore the courts have relaxed the burden on the plaintiff. A person claiming of employment discrimination is required to show a *prima facie* case of discrimination,[77] thereafter the onus shifts onto the employer to show that the conduct did not constitute discrimination or that there is a legitimate non discriminatory reason for the conduct.[78] If the employer consequently shows that there was a legitimate reason for the conduct, the complainant will then have to satisfy the court that the reason given by the employer is merely a pretext.[79] This the complainant will have to do on a preponderance of probabilities. From all of the above, it is patently clear that plaintiff bears the full burden of establishing intentional discrimination.[80]

The need by Courts in requiring the plaintiff to show intention to discriminate has been severely criticized. Rhode argues that the determination of intent is 'a highly indeterminate and unnecessary divisive enterprise'.[81] She goes on to ad that intention is extremely difficult

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75 . O'Regan Supra on page 74.

76 . Washington v. Davis 426 US 229 (1976).

77 . McDonnel Douglas Corp v. Green 411 US 792 (1972).

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for the plaintiff to prove, especially in cases where there appears to be 'mixed motives'.

Sex discrimination legislation is aimed at prohibiting the disadvantage caused to women and men by sexual stereotyping. The genuine occupational requirement defense may well be used to persist in disadvantaging women because of stereotypes. Unless a court is willing to consider the individual qualities of the women concerned and the possibility of restructuring the workplace in ways that will permit women to participate more fully, the above defense will undermine the purpose of anti-discrimination legislation.[82] This is not likely to happen where the only defense allowed is based on biological sexual characteristics as a necessary employment qualification.[83]

The persistent problem with the justification grounds ans with the requirement of establishing intent arises not from legislative drafting but from the formulation of anti-discriminatory legislation as a form of statutory tort or delict. Even were legislation specifically to exclude justification grounds, the courts would be unlikely to grant compensation against defendants where they felt that the defendants had not acted in a legally blameworthy fashion. This appears to be attributable to the nature of anti-discrimination legislation itself. It tends toward the flavor embedded in delictual liability: to impose compensatory duties on people who have wrongful caused harm. This approach assumes that discrimination is aberrant conduct in our society; but the patterns of discrimination suggest that this is not so.[84]

Another problem area within the arena of anti-discrimination legislation is the fact that employers tend to focus on the characteristics of a specific individual. In some instances, discriminatory conduct is based on generalizations that certain qualities of a women make them specifically unreliable.[85] Cases of this nature deserve special attention because the

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[82]. O'Regan, Supra page 76.

[83]. Harvard Note 84 (1971) Harvard Law Review 1109 at 1178-9.

[84]. O'Regan, Supra.

[85]. Phillips v. Martin Marietta Corporation 400 US 542 (1971) - An employer had refused to employ a women who had pre-school children. Marshall J (at 544), in a minority opinion, ruled that the employer could not argue that the conduct was justifiable even if the employer proved statistically that such women were less reliable employees than men.

discrimination concerned arises out of generalized assumptions or stereotypes about women. In the case of *City of Los Angelese v Manhart*[86], Stevens J ruled that:

'Even a true generalization about the class is an insufficient reason for disqualifying an individual for whom the generalization does not apply.'[87]

He continued later on in the judgment:

'the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify employees in terms of religion, race or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.'[88]

In summation, this approach tries to stress the importance of not allowing an employer to base its decision as to how to treat a women on generally imputed characteristics or on stereotypes. Discriminatory conduct on the part of the employer may only be justified where the characteristic concerned applies to the individual concerned. The approach of anti-discrimination legislation is to disqualify race, sex, religion etc, as a relevant factor in decision-making. An emphasis on the characteristics of the individual concerned is encouraged. Anti-discrimination legislation is unlikely to be an effective tool to promote equality in employment because it is founded on principles of symmetry and individualism. The concept of "symmetry", *prima facie* appears to be fair in that it requires women to be treated equally to men, but it tends to disintegrate in cases where men and women cannot be treated the same because of biological differences etc. On the other hand we find the concept of "individualism", which ignores the group basis of discrimination. "Like the old proverb of 'not seeing the wood for the trees', the focus on the individual loses the perspective of the broad social pattern of disadvantage which proponents of social reform would want anti-discrimination legislation to address".[89]

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[86]. 435 US 702 (1978).

[87]. Ibid at 709.

[88]. Ibid.

[89]. O'Regan, Supra at page 79.

This brings us back to the position that the law is both too specific and too selective in is choices of causes in the cycle of disadvantage to be capable, in itself, of delivering real substantive equal rights.[90] As we have already seen, the purposes of anti-discrimination legislation in most cases have not been fulfilled in that they profess to achieve certain advantages, yet at the same time display evidence of an even more severe form of inequality. What then are our options in this regard? Do we state the purposes of anti-discrimination legislation differently?

In the UK the classic liberal definition of the aims of anti-discrimination legislation was stated as follows:

[1] A law is an unequivocal declaration of public policy.

[2] A law gives support to those who do not wish to discrimination, but who feel compelled to do so be social pressure.

[3] A law gives protection and redress to minority groups.

[4] A law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions.

[5] A law reduces prejudice by discouraging the behavior in which prejudice finds expression.[91]

In other words, anti-discrimination legislation was also supposed to lend support to those who wanted to resist the pressures imposed on them by society to discriminate, in addition to the fact that they were supposedly the educators of those who were prejudiced. A problem that can be associated with this notion of anti-discrimination legislation taking on an educational role is that it hinges on the supposition that there is a social consensus about the need to promote equality of opportunity. But we have to realize that we are a nation faced with

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90. D Bell in B Hepple & E Szyszczak Discrimination: The Limits of Law (1992). At page 27.

91. Report of The Race Relations Board for 1966-67 (London, HMSO, 1968) para 65, - In : D Bell, **Supra.** At page 27.

enormous challenges. We are all part of a process of conflict between different values and beliefs, each one struggling for their own dominance. The law is faced with the formidable task of having to police conditions of disparate social integration.

Anti-discrimination legislation enumerates the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In some jurisdictions, they have approached this problem by setting forth extensive catalogued of traits, which cannot be the basis for discrimination. The Constitutional guarantee as afforded by section 9, promises that no person shall be denied the right to equality before the law. But this would have to co-existent with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various group or persons. What we have to do, is attempt a reconciliation of the principle with reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.[92]

In the absence of institutional and cultural reform, however, anti-discrimination legislation alone will do little to empower the majority.[93] Indeed, it may the catalyst that leads to tokenism. Employers will then place individuals from historically disadvantaged groups in positions that have no real influence or prospects of advancement. Moreover, the environment may prove so full of obstacles, or even hostility, that individuals cannot perform well. An exclusive focus on reforming decision-making makes individuals the principle source of change in the workplace. Employers and fellow workers become, not part of the process, but rather the objects of legal challenges. The government cannot easily intervene in these situations, and may fall back on time-consuming and expensive court cases. Then, even if

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92. United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980).

93. See, e.g., Heckman and Verkerke, *'Racial Disparity and Employment Discrimination Law'*. 1990.

individuals win, they often find they cannot function in their new positions. It distills into the formula that anti-discrimination measures , in order to protect individuals have to be combined with measures that encourage institutional and cultural change by employing organizations.

CHAPTER 2

Discrimination in Recruitment and Selection

Parliament , trade unions and employers are focussing attention on the new Basic conditions of Employment Bill, important aspects of the Labour Relations Act (LRA)[94] - which came into force in 1995 - are at last beginning to have a profound influence on employment practices. Based to a large extent on the new constitution and on international conventions, guidelines and practices, the LRA (which can still be considered "new" as far as laws go) has introduced changes which have been described as "more wide-ranging than most employers realise.

The Act provides important relief to job applicants who claim that they are the victims of unfair discrimination. According to paragraph 2 of schedule 7 of the Act, an "employee" includes an "applicant for employment". The effect of this is that any job applicant, like an employee, will have the right not to be subjected to any unfair labour practice including "unfair discrimination" based on "any arbitrary ground: such as race, gender, sex, ethnic origin, sexual orientation, age, religion, disability, political opinion, culture and marital status, provided that any distinction, exclusion or preference based on the inherent requirements of a particular position would not constitute unfair discrimination and accordingly an unfair labour practice.[95] Not only does this section of the Act afford relief to first time job applicants, it also comes to the aid of those feel they have been discriminated against when applying for promotion within a company.

Up until this Act was promulgated (in 1995), the LRA did not include an applicant for a job as an employee and therefore, if you were looking for a job, you did not have any rights in respect of whether you felt you were being discriminated against. The media has tended to ignore the section, but it does have universal impact because everybody is a job applicant at

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[94]. The Labour Relations Act 66 of 1995.

[95]. Matheson, B. "Recruitment policies and employer liability - a new order." People Dynamics. Volume 13, No. 11, No/Dec 1995.

some stage of their lives. It has been lost in the fine print. You can see infringements in every classified advertisement section of the newspaper and it will certainly be the subject of increased ligation. Employers will have to become very careful of their hiring practices to ensure that they do not fall foul of the law.[96]

The unfair discrimination clause in legislation will have ramifications for every stage of the job-recruiting process. It will affect the wording of job advertisements, the completion of the application form (here perhaps gender issues will be even more vital than racial ones) and of course the conduct of the job interview itself. During which only questions which are pertinent to the performance of the job, should be permitted. The crucial question will always be: **Was the job application process procedurally fair?** For example, during the job interview, what the Act makes very clear is that only questions which are pertinent to the performance in the job and the objectives of that job are important. Even questions relevant to gender could be considered unfair and discriminatory. If a women can show that she is competent to do the job in terms of qualifications and experience, then why should that be a relevant question.

Stipulations in job advertisements that the applicant will be required to speak a specific language etc, seems to be a potential area of dispute. If it is very clear that a job definitely requires such a skill, then it is fine and there is no discrimination. The job function is always the critical factor. The key question should be: ***"Is the requirement an essential function of that job?"*** Similarly, with gender, the LRA and the constitution make a distinction between positive and acceptable discrimination(affirmative action) and adverse effect or negative discrimination. While affirmative action is allowed, an employer must always act procedurally fair, and should always consider all applicants for the position and should not unreasonably exclude others because of their race or gender.

What then will the remedy be where a person can show that he/she has been the victim of discrimination in the job application process? Most experts agree that the remedy is more likely to be the reinstatement of a fair procedure (for example by requiring an employer to

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[96]. Von Witt, B. *'Fired before you're hired'*. Source unknown.

grant the applicant another interview),[97] but in ceratin cases the tribunal, usually the CCMA, might grant an award of damages against the employer and in favour of the job applicant. Companies may only advertise according to what the competency requirements of the job are. In certain cases, such as that of a chartered accountant or engineer, such requirements will of necessity be that the person applying for the job have ceratin qualifications such as a diploma or degree. Furthermore, gender and age should never be used as a requirement, so that all applicants are treated the same way.

Companies have resorted to having a list of all the requirements of a job written in front of them when they answer an advertisement response. So if the CCMA or the Department of Labour were to complain that a company had been unfair in some way, they could produce that written document to show that for that particular job, every applicant was asked the same questions and subjected to the same criteria. Transparent systems that show why an applicant was either rejected or accepted, are definite step in the right direction. New legislation in this regard, has made recruitment agencies more efficient and had also caused them to pay more attention to detail. The New Act potentially offers great benefit to employers , if only because (it) forces thorough thought and preparation for recruitment and selection. Furthermore, it is widely accepted that a primary cause of avoidable resignations in any organisation, is poor selection.

DISCRIMINATION AND THE CONSTITUTION

In most countries it has generally been accepted that workplace discrimination constitutes an unfair labour practice. In South Africa, the case of *SACAWU v Sentrachem*[98] has managed to clear any doubts that might have existed in this regard. In a society like ours, which is and always has been characterised by sexual discrimination and even more prominent is the institutionalisation of racial discrimination, there are surprisingly few discrimination cases that make it to court. Employers are certainly practising discrimination, and workers care deeply

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97. Matheson, B. *'Recruitment policies and employer liability - a new order'*. 1995.

98. Cited in: *'Discrimination and the Workplace'* - In: Employment Law, 1990 6:5 P102.

about it; yet the number of industrial court decisions on the point can be counted with the greatest amount of spontaneity.[99]

The reason for this appears to be quite simply that in most cases involving discrimination, employers engage in negotiations with the affected employees. Problems with proof may also explain the dearth of the cases.[100]

SECTION 9 AND THE RIGHT TO EQUALITY

Most constitutions seek to protect and promote equality and liberty as their guiding principles.[101]

According to Professor Karthy Govender, the South African constitution, prior to the new democratic dispensation was premised on inequality and a steadfast commitment to white supremacy. Within our final constitution, we see that there is in fact a powerful dedication to the practical considerations of the right to equality. This in turn displays a very conclusive detachment of the past constitutional dispensation. All in all it seems as though we now have a system, where the right to equality of treatment is to be regarded as being paramount.

The right to equality is a universally accepted fundamental right in terms of **Constitutional Principle II**. It is also expresses as a central constitutional commitment in Constitutional Principles I, III, and V. The right to equality and non-discrimination on certain prohibited grounds are fundamental norms of international human rights law.[102]

Article 26 of the Covenant on Civil and Political Rights has played an important role in developing both international and national standards on equality and non-discrimination. It reads as follows:

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[99]. "Discrimination in the Workplace", in *Employment Law*, (1990), 6:5 pp102-106.

[100]. Ibid.

[101]. Van Wyk, M. *'The constitutional contours of* affirmative action as 'Fair discrimination' , In: The Human Rights and Constitutional Law Journal of South Africa., volume No 4, February 1997.

[102]. A masters article written by Professor Karthy Govender, entitled : *'Equality'*.

" All persons are equal before the law and are entitled without any discrimination of the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

THE CONTENT AND SCOPE OF THE RIGHT IN INTERNATIONAL AND COMPARATIVE LAW

Formal and substantive equality

Formal equality is a principle of equal treatment which requires that those individuals who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them.[103] This principle derives from Aristotle's principles of justice. It implies that not all differences in treatment by law are discriminatory.[104]

A number of cases within the United States jurisprudence have adopted a test which enquires whether individuals or groups are "similarly situated" for the purpose of deciding whether they should receive equal treatment[105] This principle has been criticised because it provides little guidance on how to distinguish between a case of legitimate differentiation by the law and unjustified discrimination. It also does not always lead to fair and equal outcomes. An approach that puts the emphasis on the results of effects of a particular rule or practice as opposed to its form, represents a substantive approach to the equality principle. Thus, a rule which may appear neutral and non-discriminatory may have an unequal impact or outcome for particular groups.[106]

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[103]. See generally Albertyn, C. and Kentridge, J, *'Introducing the right to equality in the Interim Constitution'* 1994.

[104] "It was a wise man who said that there is no greater inequality than the equal treatment of unequals" as per Frankfurter J in Dennis v United States. 339 US. 162 (1950) At 184.

[105]. See generally Griggs v Duke Power, 401 US. 424 and Washington v Davis, 426 US. 229.

[106]. Ibid.

An example would be a rule that required all applicants for the police force to be a certain height and weight, would have the outcome of excluding the majority of the women applicants. The concept of **"indirect"** discrimination has been recognised by the US Supreme Court in the case of *Griggs v Duke Power Company.*[107] This case dealt with Title VII of the Civil Rights Act of 1964,[108] and related to employment criteria which operated to disqualify Black applicants at a substantially higher rate than white applicants. The Court held that an absence of discriminatory intent or motive did not prevent the criteria in question from amounting to prohibited discrimination.

The formal equality standard also does not take into account that sometimes the achievement of effective equality may require special or different treatment to certain groups because of their different characteristics and circumstances. Thus for example, pregnant women may require special laws and benefits to ensure their job security.[109] Likewise groups who have suffered historical discrimination may require remedial positive measures to ensure that they enjoy substantive equality. The formal approach to equality is exemplified by the case of *Gelduldig v Aiello,*[110] in which the U.S. Supreme Court held that pregnancy discrimination is not the same as sex discrimination. In this case the plaintiff challenged a state law providing disability benefits for every temporarily disabling condition other than those resulting from pregnancy and the delivery of a child. The Supreme Court agreed that pregnant women would be deprived of benefits under the law, but said that this was not a case of sex discrimination because both of the comparable groups included women: pregnant women in one group, and all men and non-pregnant women in the other.

Similarly in the Canadian case of *Bliss v A-G*, the Unemployment Insurance Act of 1971 was held not to be discriminatory. This Act required pregnant women to have a longer period of insurable employment than all other claimants in order to qualify for the prescribed benefits.

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[107]. 401 US. 424.

[108] Civil Rights Act 1964 (United States of America).

[109]. Cf. O'Regan, C. *"Equality at work and the limits of the law: Symmetry and Individualism in anti-discrimination legislation'*, 1994 and O'Sullivan, M. *'Theory and practice of Judicial equality'*. 1994.

[110]. 417 US. 484.

The court held that the legislation defined the qualifications for the benefits, and did not involve a denial of equality of treatment in the administration and enforcement of the law before the courts. Special measures to redress the effects of both historic and systemic causes of disadvantage constitute substantive approaches to equality. Largely owing to a formal and narrow construction of the equality principle in early Canadian cases, a number of changes were introduced in the drafting of the equality clause in the Canadian Charter of Rights and Freedoms.

Section 15 of the Canadian Charter reads as follows:

[1] "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[2] Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The abstraction of ***"equal benefit of the law"*** was introduced to enable the courts to examine whether legislation or programmes which confer economic or other forms of benefit (e.g. unemployment or disability benefits) on certain categories of persons amounts to unfair discrimination. The Canadian Supreme Court has held that in deciding whether a law discriminates against any group of persons regard must be had to "the content of the law, to its purpose, and its impact upon those to whom it applies, and also to those whom it excludes from its application. This determination is to be made not only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and economic fabric of our society.

The constitutional protection of equality rights, is designed to protect those groups who suffer

social, political and legal disadvantage in our society. The UN Human Rights Committee also adopts a substantive approach to the principle of equality in elaborating the provisions of the **International Covenant on Civil and Political Rights** (1966). It has thus held that the term "discrimination" as used in the Covenant should be understood to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".

It goes on to point out that the enjoyment of rights and freedoms on an equal footing, does not mean identical treatment in every instance. Aristotle once said equality is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference.[111] But this leaves us with even more of a dilemma, because we are not told of the degree of match that can be regarded as necessary between two entities in order to be considered like. Furthermore, in what ways must treatment be the same in order to be alike? There is silence as to the attributes to be taken into account in establishing likeness or unlikeness.[112] This approach seems to centre on the idea of "sameness". Formal equality requires an even distribution of entitlements, whereas substantive equality, is geared towards the goal of achieving equality, and accepts that this might require the allocation of goods/benefits/entitlements may be differential in order to reach this goal.[113]

The Principle of affirmative action tries to correct factual inequality and is also recognised in the **International Convention on the Elimination of All Forms of Racial Discrimination** (1966) **[Article 1 (4)]**, and the **International Convention on the Elimination of All Forms of Discrimination against Women** (1979) **[Article 4]**. The Human Rights Committee has also interpreted the right of equality before the law and non-discrimination in **article 26** of the Covenant to apply to any benefit conferred by the law of a State party. Legislation in the

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[111]. Aristotle Quoted in Peter Westen 'The empty idea of equality' (1982) 95 Harvard Law Review at 543.

[112]. Janet Kentrdge, *"Measure for measure: Weighing up the costs of a feminist standard of equality at work"*, in Acta Juridica, 1994, p84 at page 86.

[113]. Ibid at page 89.

Netherlands relating to unemployment benefits was held to be in violation of **article 26** because it required married women to prove that they were bread winners before they could receive benefits, a condition not applied to married men. The Human Rights Committee rejected the argument that the right to social security was an economic and social right and, as such, did not fall within the scope of the Covenant on Civil and Political Rights. **Prohibited grounds of discrimination.**[114]

As in section **8** of our **Interim Constitution**, the specified grounds of prohibited discrimination in the international human rights instruments are not exclusive. Thus **article 26** of the **Covenant on Civil and Political Rights** states that the law shall guarantee equal and effective protection against discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status also referred to in **article 2(1)** of the Covenant. These grounds are based on **article 2** of the **Universal Declaration of Human Rights**. The following grounds listed in the international instruments do not appear in **s.8 (2)** of the **Interim Constitution**: national origin, property, birth or other status (although section 8 also includes additional categories of prohibited discrimination, e.g. disability). The UN Human Rights Committee has observed the omission of certain enumerated grounds of discrimination in a number of national constitutions and laws, and has requested information from States parties as to the significance of such omissions.

SOUTH AFRICAN LAW:

Under the apartheid reign, the entire South African legal and political order was based on racial discrimination. Racial discrimination was entrenched by all laws in all spheres of life in South Africa: be it political, civil, economic, social and cultural. Thus although the common law of South Africa is based on the principle of formal equality of all persons before the law, this principle was effectively undermined by apartheid legislation. In addition, the common law of contract (based on the principle of freedom of contract) allows individuals to refuse to

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[114]. *'The empty idea of equality'* - In : Harvard Law Review vol 95 1982.

enter into contracts with certain persons, even when such refusal is motivated by racial or other forms of prejudice. In this way access to important social goods and services can be denied to persons of certain races, to women and other groups who are the victims of social prejudices and stereotypes.

The Interim Constitution[115] represented an attempt at dissociation from this past. Section 8[116] of the interim constitution prohibits racial and other forms of discrimination. This prohibition is binding on "all legislative and executive organs of state at all levels of government".[117]
A further issue arising from section 8 is the relationship between the qualifier, **"unfair"** discrimination and the general limitations clause, section 33.[118] The courts will have to distinguish within the framework of section 8 when discrimination is **"fair"** and hence permissible, and when it is not. It may be argued that this allows for "greater contextual sensitivity to the distinct values and interests at stake in the particular right at issues." The qualifier, **"unfair"**, thus relates to the scope of the right itself as opposed to the justification for its limitation (a matter arising under s. 33).[119] The courts are thus given a degree of discretion in scrutinising the nature of the differing treatment in order to determine whether it constitutes prohibited **"unfair discrimination"** within the context of section 8.

This maybe relevant, for example, when special benefits or protections are conferred on pregnant employees. A court might hold that such preferential treatment does not constitute **"unfair"** discrimination for the purposes of section 8. The determination of what constitutes "unfair" discrimination should be informed by the significance of equality both as central value of our constitution and as the basis for remedying disadvantage in our society.[120] Finally, a litigant who seeks to allege discrimination on a ground not enumerated under section 8 (2) ,

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[115]. The Constitution of the Republic of South Africa Act 200 of 1993.

[116]. The Right to Equality as contained in the Interim Constitution.

[117]. Section 7 (1) of the Constitution Act 200 of 1993.

[118]. Ibid

[119]. Interim Constitution Act 200 of 1993.

[120]. See Constitutional Principle V.

will bear a greater burden of proof. As she will not be assisted by the presumption in section 8 (4) , she will have to prove not only that she has suffered discrimination, but also that this discrimination is "unfair".

It has been suggested that our courts should adopt the Canadian approach by restricting the grounds of discrimination to those which are either listed or analogous to the listed grounds. The determination of what constitutes an "analogous ground" is said to relate to human characteristics which are either immutable (race, colour etc.) or very difficult to change (sex, language, culture). Others are of the conviction that this approach is too inhibiting, and do not give proper effect to the words in section 8 (2), ***"without generating from the generality of this provision."*** The protection of section 8 (2) can be extended to cover distinctions which are either named or analogous to those named provided that the discrimination in question is unfair in that it creates or reinforces the subordination of a vulnerable group or class of persons.

On this interpretation section 8 (2) is not applicable only to natural persons, and corporations can also rely on section 8 (2) in the aforesaid circumstances. Section 33 (4) provides that *prima facie* proof of discrimination on any of the grounds enumerated in section 8 (2) shall be presumed to constitute unfair discrimination until the contrary is established. It should also be noted that in *Motala and Another v University of Natal*,[121] the Supreme Court upheld the admission criteria of the University which were based on affirmative action principles in terms of section 8 (3)(a) of the Constitution. These admission criteria had been challenged as discriminatory under section 8 (1) and (2).

Section 9 of our Final Constitution provides that we have the right to equality.[122] This leads us to the inference that we should be protected and also benefit equally from such a right. In the preamble of the constitution, it is stated that one of the functions of the constitution is to:

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[121]. 1995 (3) BCLR 374 (D).

[122]. Section 9 of the Final Constitution.

> "Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law".[123]

The right to equality is both recognised and respected in most bills of rights internationally as was stated earlier on, for example this position is supported by **Article 7** of the **Universal Declaration of Human Rights** which provides that:

> "All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination."

From the case of *Andrews v Law Society of British Columbia*,[124] we can assume the nature of the right in question as being the generally imputed meaning to equality clauses:

> "the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are 'similarly situated be similarly treated' and conversely, that persons who are 'differently situated be differently treated' ..."[125]

A liberal democratic society is one that not only recognises that tis members are sometimes the victims of various types of cruelty, but also commits itself to doing something about relieving the cruelty. Affirmative Action is but one solution chosen to do this work. The ultimate end result of Affirmative Action, as most of us understand it, is to create a colour blind equal opportunity society in which there is no discrimination based on irrelevant factors such as race or gender.[126] I do not think that the goal can ever be achieved (discrimination can never be

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[123]. Section 1 (a) of the Constitution.

[124]. (1989) 36 C.R.R. 193, (1989) 1 S.C.R. 143, 56 DLR (4TH) 1.

[125]. (1989) 36 C.R.R. 193; (1989) 1 S.C.R. 143; 56 DLR (4th) 1.

[126]. Smith, C. *'Affirmative Action under the New Constitution'* 1995.

eliminated or reduced), but I do think that it ought to be pursued by distributing the discrimination more fairly. Even thought the gaol can never be reached, the pursuit of it appears to be its own reward for society and its members. That this redistribution will have to be done at the expense of discriminating against members of other groups, particularly whit males who have traditionally not been the target of discrimination, is a price I think we ought to be willing to pay for two reasons.

Firstly, the discrimination against the white males is not pursued as an end in itself. Rather, it is the unintended result of an action whose main intentions lay elsewhere. The real intention of Affirmative action policies, is not reverse discrimination, but to include more members of marginal groups in the economic and political processes. So-called reverse discrimination is the foreseen, but unintended , result of these policies. I do realise however this argument alone is not enough to make affirmative action acceptable. This unintentionality, however, does not in itself constitute justification of affirmative action. It only says that affirmative action does not mean to reverse the discrimination, but it has no choice in the matter; that is simply has it has to work. The key question is why we ought to accept those unintentional results when by eliminating affirmative action, we don't have to deal with them at all.

Secondly, it appears to be in the best interests of a liberal democratic society as a whole that it be given as much diverse input into its operations as possible. If we limit the effect that the members of s society are able to have on the growth of that society, then we limit the gains that society can provide for all its members. However, by including the voices of heretofore unheard members, we open the door for more growth overall, which will not only ultimately benefit everyone by providing a richer and more stimulating living environment, but also will teach members that no one group is inherently more important than another. This kind of recognition is just the sort of thing that out form of democracy encouraged in principle, but neglects to do in a practice.

From the above we can see that affirmative action is not an exception to the equality clause, but is rather a fundamental and necessary requisite for the effective realisation of the equality

provision. In *George v Liberty*[127], Landman P said that although affirmative action, or positive discrimination, is and will be viewed to be discriminatory in its effect against the advantaged, it is not unfair. Non-discrimination is a value and a constitutional right while affirmative action is a means to an end and not an end in itself. See p. 592E. He then concludes as follows at p. 593C:

> "In my opinion the concept of the unfair labour practice is one which must keep in touch with contemporary values or priorities in society that should reflect the realities of society. Fairness and Equity as well as other considerations, dictate that affirmative action in South Africa is an imperative which at this stage of our history must be allowed to outweigh eh injunction not to discriminate on the basis of race and gender."

In a similar vein Kentridge in the chapter on equality in the **Constitutional Law of South Africa**, pp 14-25[128] said the following:

> "Understanding section 8(3) as a guide to the interpretation of section 2 accords with the meaning I have attributed to the word 'unfair' in section 8(2). On the interpretation section 8(3)(a) lays down the conditions on which positive discrimination is not unfair under the Constitution. In many situations affirmative action policies will benefit some individuals and groups and affect others adversely. The wording of section 8(2) facilitates the argument that a person thus adversely affected (let us call him the relatively privileged person) experiences discrimination, but not unfair discrimination, provided that the policy meets the requirements of section 8(3)(a)..... If the requirements of section 8(3)(a) are met, then the discrimination and issue is found not to be unfair because it is justified as a fair and rational means of achieving the object of full equality."

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[127]. (1996) 17 ILJ at 571 593J - 594A

[128]. Chaskalson, A. Constitutional law of South Africa, 1995.

In the case of *Motala and Others v University of Natal*[129], the respondent had adopted an affirmative action programme in terms of which the selection criteria applied to African students was different from those applied to Indian students. Only 40 Indian students would be admitted.[130] The applicant, a young women who had obtained excellent high school grades was denied admission to the medical faculty of the respondent and contended that the aforesaid affirmative action policy was a discriminatory practice in conflict with the provisions of sections 8(1) and 8(2) of the Constitution. The court however found the aforesaid policy was in fact a measure designed to achieve the adequate protection and advancement of a group of persons disadvantaged by unfair discrimination within the meaning of that expression as used in section 8(3)(a) of the Interim Constitution [see p. 383B-C]. The Court furthermore stated that it did not consider that a selection system which compensates for a discrepancy due to certain disadvantages to a race group runs counter to the provisions of section 8(1) and 8(2) [p. 383D-E].

Although item **2(1)(a)** of **Schedule 7 of the 1995 Labour Relations Act** refers to unfair discrimination either directly or indirectly, against an employee based on ***inter alia*** race , gender, etc., as an alleged unfair labour practice, **subsection (2)(1)(b)** of the aforesaid Schedule specifically states that for the purposes of item (1)(a) an employer is not prevented from adopting or implementing employment policies and practices that are 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 and see that any discrimination based on the inherent requirement of the particular job will not or does not constitute unfair discrimination.

The above defence has received a substantial concern abroad. Certain general principles may be distilled from a reading of certain cases in several international jurisdictions. These general principles include the following:

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[129]. 1995 (3) BCLR 374 (D).

[130]. See p . 378 H.

Business necessity: where the essence of a business operation will be undermined if the differentiation is not made; the need for authenticity: is also recognised by other jurisdictions as playing as significant role; the need to preserve privacy and decency; the nature of the job: may be such that it may call for persons of a specific sex for reasons of physiognomy or dramatic performances.[131]

In the matter of the *President of The Republic of South Africa and Another v Hugo* , Case No CCP11/96 Justice Goldstone said the following with regard to section 8(3) of the Interim Constitution on p36 thereof:

"In section 8(3) the Interim Constitution Contains an express recognition that the is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need , therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the Constitutional gaol of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."

Most South African writers seem reluctant to address the issue of whether affirmative action can ever amount to reverse discrimination (beyond a flat denial that affirmative action is reverse discrimination). It may well be that there is a real fear that by admitting that not all forms of affirmative action can be benign discrimination, commentator (especially if he or she happens to be a supporter of affirmative action) may be tainted by this admission with being an opponent who professes support while in reality wishing to protect white privileges. To admit that affirmative action must have boundaries is not to oppose it.[132]

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[131]. "Recruitment policies and employer liability - a new order", In: People Dynamics, NOV/DEC 1995, pp71 - 72.

[132]. Van Wyk, "*The constitutional Contours of Affirmative Action* as 'Fair Discrimination' ", 1997.

In order to be able to evaluate the constitutional validity of affirmative action we have to examine the purpose for having such a programme in place. We have to determine whether its' focus is retribution or compensation or whether it in fact is really being used as a vehicle to achieve greater substantive equality or substantive equality of opportunity.[133] It may be argued that should an affirmative action programme be found out to promote reverse discrimination based on a scheme of racial classification, it should not be allowed to pass the constitutional test. Our Constitution strives for equality of opportunity rather than equality of outcome in order to promote the ideals of freedom and egalitarianism.

There are three models or forms of affirmative action:
A strong, an intermediate and a weak form.[134] According to the **"strong variant"**, a person qualifies for preferential treatment solely on the grounds that he she or she possesses an immutable characteristic (eg. An employee is promoted because she is female, without satisfying any of the job specifications). In the **"intermediate or moderate variant"**, of affirmative action the person meets the minimum standards/qualification for the job and is given preference over another candidate who is better qualified, because of some immutable characteristic which he/she possesses but the better qualified person does not (eg. the job specifies matric a minimum qualification but preferably a bachelors degree, and a black matriculant is promoted rather than the white male graduate candidate). In the **"weak variant"** of affirmative action a black/female/handicapped etc employee is promoted in preference to an able bodied white male only if both candidates are equally qualified for the job.

It is obvious from the above that the weak and intermediate variants of affirmative action will pass the test of constitutional scrutiny. It is therefore not necessary to focus on those two models. It is however imperative that we concentrate on the model of **"strong affirmative action".** This type of action has the effect of absolutely excluding certain groups. It has often

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[133]. Ibid

[134]. Sloot (1986) : p217.

been asked if the strong variant is nothing more than a restatement and application of apartheid. Could the strong variant of affirmative action , if applied to include blacks (and exclude whites) be constitutional? The answer would have to be in the negative.[135] Even though such a policy might give rise to a system of substantive equality generally speaking, it would be exclusionary and denigrating in its operation and would be counter to the principle of reconciliation as contained in the interim constitution.

What then do we do about this entire problem of affirmative action resulting in nothing more than "reverse discrimination"(or rather unfair discrimination which is then regarded as being unconstitutional) rather than it amounting to 'positive discrimination'(regarded as fair discrimination and is there a permissible intervention in terms of S9 of the Constitution). To discriminate '.....is to fail to treat fellow human beings as individuals'.[136] From this we can safely say that affirmative action based on group membership alone as the only dimension of personality, (to the exclusion of the riches of each person's individuality and individual circumstances) will amount to discrimination.[137] This is so since our Constitution does not prohibit discrimination totally, it does make provision for fair discrimination. This is further reinforced by the presence of s9(2) which allows for positive discrimination. Prof. Van Wyk on this question asks further whether discrimination in favour of disadvantaged groups will always be fair, irrespective of the means chosen to advance those objectives.[138]

In my previous submission I argued, along with the assistance of Prof Van Wyk that our Constitution endeavours toward a conscious effort of creating substantive equality of opportunity rather than of outcome. Substantive equality of opportunity seems to be our starting point, we therefore need to determine what the limits of this theme are. The guarantee of equality may be deviated from if it is done in order to advance persons or categories of persons disadvantaged by unfair discrimination. It is a well known and

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[135]. Van Wyk, 1997, p16.

[136]. Van Niekerk a *"Equality Rights and the New Act"* (1995) P77.

[137]. Van Wyk (1997) p18.

[138]. Ibid.

established fact that not all South Africans were unfairly discriminated against, even in cases where the majority of the members of particular groups were unfairly treated. It follows that individuals who have not been "disadvantaged by unfair discrimination"are not covered by sub - section 9(2) and therefore that affirmative action programmes that confer advantage on such individuals will amount to an unconstitutional deviation from the equality principle.

Affirmative action schemes which would have the effect of absolutely excluding non - beneficiaries from competing for social goods, would fall outside the scope of subsection 9(2). For this reason some group based quota models of affirmative action may well be unconstitutional.[139] In terms of Section 9(2) therefore, any affirmative action scheme that aims at assisting actual victims of discrimination of the past would be constitutional. All section 9(2) provides is that certain groups or categories may betaken into account when identifying those disadvantaged individuals, it does not it does not grant a license to allege that race/gender are in themselves badges of disadvantage. They may however be used as a presumptive indication of unfair discrimination for the purposes of easy identification. In other words although race and gender may be useful in identifying victims of unfair discrimination, they do not by themselves constitute conclusive proof of unfair discrimination.

It is submitted that indicators of socio - economic deprivation combined with the presence if indirect ***indicia*** of deprivation are sufficient to qualify a person as being entitled to the benefits of affirmative action.[140] This means for example that a black indigent female would be an appropriate candidate for affirmative action, not solely on the basis that she is black, but because she in actual fact is in a disadvantaged position. Her race and gender will merely create a "presumption" of unfair discrimination but it is her actual material circumstances that will confirm this presumption and grant her access to the protection offered by the affirmative action programme.

From this we can say that affirmative action is and can not be regarded as being reverse

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[139]. Van Wyk (1997) P19.

[140]. Ibid.

discrimination. By equating affirmative action with discrimination, we involve ourselves in a pointless exercise since the dominant purpose behind such a scheme would have to be inclusion rather than exclusion which is the case in discrimination. Also, affirmative action requires positive action to overcome systemic , institutionalised discrimination. Anti discrimination laws on the other hand are passive in the sense that they proscribe someone from indulging in ceratin types of behaviour.

Bad laws based on bad classifications cannot be saved simply because they are equally applied to whom it has application.[141] Thus, laws which uniformly treated black people differently form white people on the basis of race would be a isolation of the equality provision in the absence of compelling reasons justifying the distinction. It is necessary that consideration also be given to 'the content of the law, to it's purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application'.[142] The purpose of the equality provision is to restructure, foster and develop a society 'in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration".[143]

In South Africa we are faced with a situation of a very conscious asymmetrical allocation of resources. This was fulfilled during the subsistence of our past government. Therefore, we need to use the equality provision as a swift and productive mechanism to ensure speedy governmental action to equalise the imbalances of the past. This is provided via the safety mechanism in **Section 9(2)**.

Section 9 (1) guarantees the right to be treated equally by the law, to be afforded equal protection of the law and to equally enjoy the benefits of the law. **Section 9 (2)** provides that the right to equality includes the full and equal enjoyment of all rights and freedoms. In order to achieve this, legislative measures designed to advance persons previously disadvantaged by racial discrimination may be undertaken. **Section 9 (3)** prohibits ***unfair discrimination***

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[141]. O'Sullivan, M. *'The potential and limits of the law'*. 1994.

[142]. Van Wyk 1997 at p13.

[143]. Karthy Govender in notes on equality.

directly or indirectly on any 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. **Section 9 (5)** contains a presumption that assists the person alleging discrimination. Unfair discrimination is presumed if the person proves that he or she has been discriminated against directly or indirectly on any one of the grounds mentioned in **section 9 (3)**.

The right to equality as contained in the final constitution is different from **section 8** of the **Interim Constitution** in the following respects:

* **Section 9** makes it explicit that the right to equality means both substantive and procedural equality and that affirmative action is an essential component in the realisation of the right to substantive equality.

* **Section 9** of the Final Constitution makes the right to equality horizontally applicable.

THE RIGHT TO BE TREATED EQUALLY

The mere fact that an equality clause is contained in a constitution does not deter government from making classifications. People may be classified and treated differently according to that classification, for legitimate reasons. However, in making these classifications, government will have to ensure that the **criteria** upon which such classifications are based are legitimate as well. a classification would be regarded as being acceptable if there is a sufficient link between the criteria used to effect the classification and the governmental objectives. So in essence, we are dealing here with the purpose for which such a classification does in fact exist.

Seervai, after analysing the Indian cases, restates the proposition thus:

> "Permissible classification must satisfy two conditions, namely, (1) it must be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out of the group, and (11) the differentia must have a rational relation to the object sought to be achieved by

the statute in question".[144]

In the United States of America, the US supreme court have developed levels of scrutiny, which are dependant upon the nature of the classification.[145] When the court examine classifications brought by socio-economic legislation, they utilise the highly differential **'rational relationship test'** . The courts will not interfere provided that the classification seeks to serve a legitimate public purpose and provided that the classification seeks to serve a legitimate public purpose and provided that the is a rational link between the classification and the objective sought to be attained. The courts adopt a strict scrutiny analysis where a 'suspect classification' such as race is used where the classification prejudices a fundamental right.

Government will not be able to escape liability by claiming that there **is** a governmental interest concerned that justifies a specific classification. Courts will insist that government support such a contention by showing that they are in fact pursuing a **'compelling or overriding'** end. The limitation has to be of such a great magnitude that it justifies the limitation of a fundamental right. In the event that the government demonstrating such an end, the classification will not be upheld by the courts unless the justices have independently reached the conclusion that the classification is necessary to advance that compelling interest. Absolute necessity might not be required, however, the justices will require the government to show a close relationship between the classification and the promotion of a compelling or overriding interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.[146]

There is in addition, a third standard that is used in the case of classifications based on gender. In terms of this standard, the government must show that the classification that it has used is 'substantially related to an important governmental objective.[147]

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[144]. Seervai *Constitutional Law on India* (4th) 454 (para 9.33)

[145]. See Cachalia et al Fundamental Rights in the New Constitution (1994) 28.

[146]. Nowak, Rotunda and Young Constitutional Law (3rd) 530.

[147]. Craig v Boren 429 US. 190 at 197.

It has been argued that our equality provision was premised on the Canadian model. Section 15 (1) of the Canadian Charter of Freedoms and Rights reads as follows:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

It is important to note that when engaging in interpreting the equality clause of the South African Constitution, we have to examine the wording of the right within the constitutional context, and it is imperative that we take cognisance of our history.

Accordingly **Section 9** of our Constitution expressly includes the following:

* The right to equality before the law.
* The right to be equally protected by the law.
* The right to equally enjoy the benefits of the law.
* The right to the full and equal enjoyment of all rights and freedoms.
* The right not to be unfairly discriminated against on grounds including those listed.

EQUALITY BEFORE THE LAW

This concept has on numerous occasions been referred to as formal equality. Basically, it entails a practice of *"all persons being treated in the same manner by the same law"*.[148] In the case of *S v Ntuli* [149], was faced with the validity of sections of the Criminal Procedure Act 1977.[150] The relevant sections in the Act distinguished between unrepresented appellants who

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[148]. Davis *'Equality and Equal Protection'*: Rights and Constitutionalism (1994) at 200.

[149]. S v Ntuli 1996 (1) SA 1207.

[150]. Section 309 read with section 305 of the Criminal Procedure Act 1977.

were in prison and other appellants. In terms of these sections, only an unrepresented appellant had to secure a certificate from a judge, authenticating that there are reasonable grounds for the review, prior to pursuing an appeal. This meant that all prisoners who had bee represented or persons fined or received suspended sentences had lesser of an onus to discharge. They were treated more favourably by the law.

The court held that these provisions infringed the right to have recourse by way of appeal or review to a higher court **(section 25{3} {h})** and the right to equality before the law **(section 8 {1})** . Justice Didcott, felt this violation was in direct threat to the right o equality rather than the prohibition against discrimination. Even if you had to interpret the right o equality on a very understanding, you would still come to come to the conclusion that it encompassed a guarantee that every person would be treated equally by our courts of law. This Act was in direct contravention of this guarantee by imposing a greater burden upon unrepresented prisoners in the event of an appeal being pursued.

From all of the above we can safely say that the right to equality may, in suitable circumstances, rank separately from the right to be free from unfair discrimination.[151]

THE RIGHT TO BE EQUALLY PROTECTED BY LAW AND THE RIGHT TO EQUALLY ENJOY THE BENEFITS OF THE LAW

Laws that grant to persons, some sort of benefit, or laws that forbid or regulate activities have to be equal in their application. Under this analysis, a court has to by necessary implication, engage itself in evaluation of the substance and content of the law and determine whether the legislative choices were correctly made.[152]

THE RIGHT TO THE FULL AND EQUAL ENJOYMENT OF ALL RIGHTS AND FREEDOMS

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[151]. Note, that I will deal with the concept of unfair discrimination in a later chapter.

[152]. Karthy Govender from Kentridge: Equality in Constitutional Law of South Africa (1995) at 14 - 14.

The apparatus that secured the apartheid era had perpetuated a strategy that deliberately favoured designated people while simultaneously discriminating against others. This in turn has left our country in a position where there will always be the haves and the have nots, unless a positive obligation is imposed on government to make sure that everyone **fully** and **equally** enjoys all rights and freedoms. This is exactly what section 9 in our final constitution accomplishes. It is manifest, that any state that allows its laws and regulations to effect a situation in which some people are more equipped to enjoy rights and freedoms than others, would be in serious breach of this section. [153]

Our Constitution has incorporated Section 9 (2) which grants us the right to full and equal enjoyment of all rights and freedoms. In order for these rights to be truly realised and utilised, they have to be satisfactorily equipped. The state would be obliged to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. [154]

South Africa is placed in a very unique situation. We have to demonstrate a strong commitment to substantive or real equality. Therefore it is clear that the drafts persons intended that an affirmative action be brought into immediate action, in fact as an absolute necessity to the realisation of true equality. This affirmative action scheme is and should never be seen as a limitation or exception to the right of equality, in fact people that intend challenging such a scheme, would bear the onus of proving that such a scheme is illegal. [155] Affirmative action legislation makes its way into our daily lives via the express consent of the highest authority in our land viz the constitution. This implies that there is no question as to whether preferential treatment of disadvantaged persons is permitted or not. [156]

Affirmative action programmes must:

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[153]. Tussman and Tenbroeck, *'The equal Protection of the laws'* 37 California Law Review 341 (1949).

[154]. San Antonio Ind. School District v Rodriguez 411 US. (9173)

[155]. Ibid.

[156]. Smith : Affirmative Action under the new Constitution 1995 (2) SAJHR 84 AT 86.

[1] promote the achievement of substantive equality.

[2] be designed to protect and advance persons disadvantaged by unfair discrimination.

In other words, affirmative action programmes should be designed to achieve the above two aims and should in fact achieve those aims.[157] In addition they should also be capable of achieving those aims in question. The beneficiaries of the programme must be persons or categories of persons who have been disadvantaged by unfair discrimination in the past. In the case of *Motala v University of Natal*[158] :

A gifted Indian student who had obtained five distinctions and a 'B' symbol in matric was refused admission into the medical school. The medical school argued that they used an affirmative action policy in order to circumvent the difficulty caused by poor standards of education available to African students under the control of the Department of Education and Training. African students with lower matriculation results, than students whose applications were turned down, were accepted. It was argued that as the Indian community were also disadvantaged by apartheid, discrimination between African students and Indian students amounted to unfair discrimination.

The court held that the admission policy adopted by the medical school was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which the African pupils were subjected under the 'four tier ' system of education was significantly than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of section **8 (1)** and **8 (2)** of the Interim Constitution.[159]

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[157]. E Murenik, 'A bridge to Where: Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.

[158]. Supra

[159]. Page 383 of the judgement.

THE PROHIBITION AGAINST UNFAIR DISCRIMINATION

Hogg argues that a law may be discriminatory in three different ways:

[a] a law may be explicitly discriminatory. a law which provides that only men are eligible for admission into the armed forces is an example of such a law.

[b] a law may be discriminatory in effect. If a law prescribed a height requirement for admission tot the police force and if the effect of such a requirement is to exclude female applicants then the law is discriminatory in effect. Whether this result was in tended or not is irrelevant.

[c] a law may be discriminatory in its application. a law may be constitutional, but applied in a discriminatory fashion. Thus if the police recruitment procedures led to a disproportionate number of women being rejected then the application of the law would be unconstitutional.[160]

The idea behind including this prohibition in the constitution, was so as to ensure that all of the above forms of discrimination would be covered. Thus any law which has an unfair discriminatory impact may amount to prohibited discrimination even if the law is neutral on its face.[161]In *Beukes v Krugersdorp Transitional Local Council and Another*[162], the council levied a flat rate of charges in respect of services in townships such as KAGISO and Munsieville whilst the residence of Krugersdorp paid a higher user-based levy for services. They argued that they were being discriminated against on the base of race. The TLC argued that the distinctions were nor based on colour but on practical considerations. The court held that while the TLC, did not expressly levy higher on whites it did so indirectly. Because of our history of racially exclusive areas, people resident in the town ships were almost all blacks while people resident in Krugersdorp were almost all white. The differences in charges therefore had an indirect racial impact. However, the court held that the discrimination was

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[160]. Hog op cit n 8 at 52 - 33

[161]. Karthy Govender on page 10.

[162]. 1996 (3) SA 467 at 480

not unfair as it was a temporary interim measure that had to be implemented for practical reasons such as inadequate metering facilities and the long standing boycott by residents of townships.

THE CONSEQUENCES OF THE LIST

According to **section 9 (3)** of the Final Constitution, discrimination is prohibited on the following grounds:
race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

After years of deliberation, Canadians, have limited the application of the equality provision to reviewing classifications based on the grounds listed and those analogous to it. The position in Canada was very conclusively stated n the case of *Mirhadizadeh v Ontario*[163].

'The significance of the supreme courts judgement in Andrews[164] is that the benefit of section 15 (1) is now limited to groups or classes who are enumerated in that section who can be considered analogous to them. The mere fact legislation may treat one group of Canadians differently from another is not sufficient to invoke the protection of the section. Indeed his judgement recognises the obvious fact that governments and legislatures must make distinctions and treat groups differently.

As McIntyre J said at 13:

> 'It is not every distinction or differentiation in treatment of law which transgress the equality grantees of section 15 of the Charter. It is, of course obvious that the legislature may - and to govern effectively - must treat different individuals and groups in different ways. Indeed, such distinction are one of the main preoccupations of the legislatures. The classifying of individuals and groups,

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[163]. (1989) 60 DLR (4TH) 597 at 600.

[164]. (1989) 56 DLR (4TH) 1.

> the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualification to different persons is necessary for the governance of modern society.'

Cachalia argues that the listed grounds in section 8 (2) of the Interim Constitution refer to immutable human characteristics which are difficult to change. It has been argued by Cachalia that section 8 should not be interpreted to contemplate the review of any and every classification, but only those that are enumerated or analogous.[165] The clause ***"without derogating from the generality of this provision",*** is not an invitation to test any form of classification against the equality provision. The grounds listed are immutable human traits and the unstated classifications ought to be limited to analogous classifications.

This was an issue that was dealt with in greater detail by the Namibian Courts in the case of *Mwellie v Ministry of Works, Transport and Communication and Another*[166]:

> Section 30 (1) of the Namibian Public Service Act 2 of 1980 provides that any legal proceedings against the state must be prosecuted before the expiry of twelve months after the date upon which the claimant had knowledge of the events upon which the claim is based. Plaintiff was employed by the government and was subsequently dismissed. He claimed that he was unfairly dismissed but failed to bring his cation within the twelve month period. He argued that as this law did not apply to non-state employees, it violated the **Article 10** (the equality provision) in the Namibian Constitution which provides:

[1] All persons shall be equal before the law.

[2] No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

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[165]. Cachalia et al op cit n at 27.

[166]. 1995 (9) BCLR 1118.

It was argued that the equality provision should be limited to reviewing classifications on the enumerated grounds or analogous grounds. The court declined to follow the Canadian approach and held:

> 'In terms of our Constitution it would mean that cases concerning equality before the law are restricted to classifications which involve the subjects set out in article 10 (2) of the constitution namely, sex, race, colour, ethnic origin, religion, creed or social or economic status. Bearing in mind the values expressed by the Namibian Constitution of recognising the inherent dignity of all, and according to all equal and inalienable rights, such an interpretation would run contrary to the spirit of the Constitution. To this must further be added the degree of development of the various people of Namibia, our past history of discrimination and the fact that we still sit with a legacy of pre-independence legislation originating from that era. An interpretation such as that contended for ...is therefore in my opinion too restricted and will not give effect to the aims of the Constitution.' (1137 to 1138)

The Court, however, went on to hold that there was a reasonable basis to draw a distinction between state and non-state employees in this regard. The court reached this conclusion because of the size of the public service, the turnover of staff in the Public service, budgetary constraints and the need to make detailed investigations timeously.

The Constitutional Court, in interpreting section 8 of the Interim Constitution, held in *Brink v Kitshoff*[167] that section 8 (2) of the Interim Constitution contains a wide, but not exhaustive list, of prohibited grounds of discrimination. Unfortunately, no indication was given of what criteria would have to be satisfied before an additional ground would be added to the list. It would appear that grounds analogous or similar to those listed would have to be included.
In *Baloro and Others v University of Bophuthatswana* [168] , Friedman J had to determine

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[167]. 1996 (4) SA at 217.

[168]. 1996 (4) SA 197 at 217.

whether discrimination on the basis of citizenship was prohibited by section 8 (2) even though it was not one of the grounds listed. The court held that citizenship was included by implication and thus where the University discriminated against non-South African citizens, it contravened section 8 (2) of the Interim Constitution.

The listed grounds in section 9 (3) are all personal characteristics of individuals which is not capable of being easily changed. Gibson[169]argues that immutability, within the Canadian context, be considered as a test for determining analogous grounds to those specified and that immutability be defined as 'not immediately changeable except with great difficulty or cost.' This appears to be a suitable test for determining whether analogous grounds should be added to the list.

It is submitted that the conclusion in Brink that the list is not a closed list is equally applicable to section 9 (3) of the Final Constitution . While the wording of section 9 (3) is different to that of section 8 (2) of the Interim Constitution, it is clear that the former does not intend the list to be exhaustive.

The Constitutional Court judgment in Brink v Kitshoff[170] provides valuable insight into how section 9 (3) of the Final Constitution is likely to be interpreted.

The court had to consider the constitutionality of section 44 of the Insurance Act 27 of 1943. The effect of this section was that when a life insurance policy had been ceded by a husband to his wife more than two years before estate became sequestrated, the wife would only be entitle to a maximum of R30 000. The remainder would fall into the insolvent estate of the husband. If the policy was ceded within two years of the husband's estate being sequestrated, then all the proceeds of the policy would be deemed to be part of the husband's insolvent estate. The Act made no reference to life insurance policies ceded in favour of the husband by the wife.

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169. The Law Of The Charter: Equality Rights (1980) 158.

170. Supra

The issue before the court was whether this disparity violated the right to be treated equally enshrined in section 8 of the Interim Constitution. The court held that section 8 (2) contained a wide, but not exhaustive, list of prohibited grounds of discrimination. The disparity in treatment meant that married women were disadvantaged and married men were not. The court held that the constitution was unequivocal that discrimination on the basis of sex had to be eradicated from out society. The court concluded that the discrimination was unfair without conducting any analysis as to the reason for the difference. Section 8 was adopted then in recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society.[171]

The court then analysed section 33 in order to determine whether the unfair discrimination was reasonable and justifiable in an open and democratic society based on freedom and equality. The purpose of the section was to protect the interests of the creditors. The court held that this was an important purpose, but found that it was not reasonable and justifiable to draw a distinction between married men and married women. Fraud could also occur if the husband is the beneficiary of the cession, yet the act was silent on such cessions. Provisions which achieve the objective of preventing creditors from being defrauded could have been drafted without discriminating against married women. The court thus concluded that it was not reasonable and justifiable to discriminate in this manner and then law was held to be unconstitutional.

Similarly in the case of *Chirach Tyre Company v Minister of Trade and Industry and Another*[172], the court observed that the framers of section 8 (2) of the Interim Constitution intended that the word *"discriminated"* would bear its ordinary neutral meaning and would be qualified by the word ***"unfair"*** which would bear its full meaning. The word unfair was not to be interpreted *eiusdem generis*[173] with the specifically enumerated grounds in section 8(2).

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[171]. O' Regan J at 217.

[172]. 1997 (3) BCLR 319 (T).

[173]. Ibid at page 320.

Importantly also was the fac that the word "unfair" should not be misconstrued to be synonymous with the word "unreasonable" as had been held in *Hugo v President of the RSA*[174]. This word had to be given the widest and fullest possible protection, but only against discrimination which is ***"truly unfair"***. When interpreting section 8(2) Mr Justice Du Plessiss says that we should learn from the Canadian experience:

> "With the adoption of the Charter of Rights, Canadian Courts faced a dilemma: on the one hand, they could not apply section 15 so differentially so as to rob it of any serious force...On the other hand, they could hardly review every distinction in the statute book,... Until the *Andrews* case was decided by the Supreme Court of Canada, most courts followed both approaches, that is, they assumed that every legislative distinction was a proper subject for equality review, but they upheld every distinction."[175]

Our legislature, be introducing the word "unfair" in section 8(2), has been able to avoid the same mistakes that out Canadian brothers have made. In the case of the *Cabinet for the Territory of South West Africa v Chikane and Another*[176], the AD concluded that the central enquiry is:

"whether the distinctions ... rest on 'reasonable basis' : that is whether they are 'founded on an intelligible differentia'; and whether that differentia has a 'rational relation to the object sought to be achieved by the statute in question'."

In another case it was held that for an action to be unfair, there must be some form of mala fides, and also that the discrimination must be based on some characteristic of the discriminatee.[177]

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[174]. 1996 (4) SA 1012 (D).

[175]. Hogg: *Constitutional Law* of Canada as quoted in Cachalia *et al Fundamental Rights In the new Constitution. Supra.*

[176]. 1989 (1) SA 349 (a).

[177]. AK Entertainment CC v. Minister of Safety and Security and Others 1994 (4) BCLR 31 (E) At 40.

They went on further to add that the fairness of a law or action should be evaluated in the light of the circumstances or context in each case. It is for that reason, that any attempt to define "unfair" or to lay down criteria that determine unfairness, would be futile. If we were to generalise, however, actions or laws would ordinarily be regarded as unfair: ***"when such action or law discriminates for no intelligible reason or purpose."***[178] If however, he reason or purpose of the discrimination is discernible, the action will ordinarily still be unfair if such reason or purpose is unreasonable. As I have already stated earlier on, if the discrimination is based on "human characteristics that are either immutable ... or very difficult to change ... Or inherently part of the human personality ... it will ordinarily be unfair.[179] At the end of the day, the unfairness of a discriminatory practice/law should be evaluated in the light of the circumstantial factors of each case.

A simple prohibition against discrimination, without reference to the word "unfair", would not recognise the distinction between discrimination against members of subordinate groups and discrimination against the privileged.[180] Discrimination may take the same form in both instances, the kind of harm is quite a different ball game. The harm caused by measures which disadvantage vulnerable and subordinate groups goes beyond the evil of discrimination.[181] Treatment of this nature will be regarded as being unfair in that it sustains and intensifies existing barriers. On the other end of the spectrum, we find measures that disadvantage powerful and priveleged groups. Although these practices might be regarded as discriminatory, they cannot necessarily be regarded as being unfair in the same way. Our Constitution in essence tries to demonstrate, that discrimination may have a different quality in different contexts, and requires that specific context is taken into account.

From my discussion, we can safely say that within the South African context, discrimination may be limited only if it is unfair. In certain instances, as patently unfair as it may seem, the

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178. Chirach case above Supra, at page 325.

179. Cachalia Supra.

180. Dennis Meyerson 'Sexual Equality and the Law' (1993) 9 SAJHR 237, especially at 250-4.

181. Albertyn C., and Kentridge J. : *"Introducing the right to equality* in the Interim Constitution, in SAJHR vol 10 (1994) P162.

constitutional guidelines may deem that said conduct to be fair, especially in regard to the grand scheme of affairs.

CHAPTER :3

Discrimination in the Workplace

Many of the major developments in the law of discrimination have occurred fairly recently, and it is an area of law which continues to develop in terms of basic principles. It is not surprising, therefore, that a certain amount of confusion exists. Furthermore, there are common misapprehensions about what constitutes discrimination and what kind of evidence can be use to prove a charge of discrimination among lawyers and non- lawyers alike. One important misapprehension is that discrimination requires conscious intent. Another area of lingering confusion is the terminology used to describe different kinds of discrimination. I will attempt in the following paragraphs to dispel misunderstandings by providing a "nuts and bolts" description of the law, which may be used as a basis for further discussion about the problems and challenges posed by discrimination cases in the academic milieu.

THE CANADIAN APPROACH

DISTINGUISHING THE DIFFERENT KINDS OF DISCRIMINATION: DIRECT, ADVERSE EFFECT AND SYSTEMIC DISCRIMINATION

At law, there are essentially two forms of discrimination: direct discrimination and adverse effect discrimination (or what the Americans refer to as the disproportionate impact of the law). The distinction between the two has been defined by the Supreme Court of Canada in the landmark case of: *Re Ontario Human Rights Commission et al and Simpson Sears Ltd.*[182] (also known as O Malley):

> "Direct discrimination occurs... where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example: 'No Catholics or no women or Blacks employed here'...On the other hand there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on it face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.[183]

It is important to note that in cases of direct discrimination, you need not prove conscious intent. This point was clearly enunciated by the Court elsewhere in the *O'Malley* judgment, and I will discuss it at greater length in the parts that follow. In the 1990s, examples of blatant, conscious discrimination, such as those given by the Court in the above quote were becoming increasingly rare. In her book, Proving Discrimination, Beatrice Vizkelety observed :

> ....it is much more common to find unequal treatment in covert form lying behind a camouflage of pretext. In this sense [the Courts words, "a practice or

[182] (1985) 23 D.L.R. (4th) 321 per McIntyre, J at 332.

[183] Ibid.

> rule which on it face discriminations"] may reasonably be interpreted to mean not that the discrimination must be overt or admitted [in order to constitute direct discrimination], but rather that the rule or practice must in some way have been based upon, influenced by or directly affected by one of the prohibited grounds.[184]

To summarize, the difference between direct and adverse effect discrimination is not whether the discrimination is overt or consciously intended. The dissimilarity is that in direct discrimination it is the **cause** of a given decision or practice which is subject to scrutiny; whereas, in adverse effect discrimination it is the **effect** upon protected group members which is of primary concern.

What then, is "systemic discrimination"? This is a term which is sometimes used to describe institutionalised discrimination or discrimination which pertains to a system. It is often used interchangeably with the term **"adverse effect discrimination"**, although the two are not really synonymous. Certainly, systemic discrimination often includes adverse effect discrimination, but it can also include direct discrimination, such as action taken by an employer on the basis of racial or gender stereotypes.[185] Indeed, systemic discrimination often includes subtle, unconscious forms of direct discrimination which may be difficult to prove but which disadvantage minorities in cumulative ways through "chilly environments" or lack of mentorship.

The Supreme Court of Canada adopted the following definition of systemic discrimination in *Action Travail Des Femmes* (supra , at 210):

> [S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote

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[184] Vizkelety, Beatrice. Proving Discrimination, Toronto: The Carswell Press, 1987, pp 59 - 60.

[185]. See Action Travail des Femmes v. Canadian National Railway et al., (1987), 40 D.L.R. (4th) 193 (S.C.C.) per Dickson, C.J.C. at 209 - 213.

> discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group that the exclusion was te result of "natural" forces, for example, that women "just can't do the job".... To combat systemic discrimination, it is essential ti create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

The remedy for systemic discrimination, where tribunal or court has jurisdiction to grant it, may entail an order, that the employer institute affirmative action policies rater than merely striking down an exclusionary decision or requiring reasonable accommodation, as is the remedy in cases of "non-systemic" direct and adverse effect discrimination. In the *Action Travail Des Femmes* case quoted above, the Supreme Court of Canada upheld a detailed remedial order of the Canadian Human Rights Tribunal which required the employer , among other things, to modify its system for the dissemination of information on positions available, to modify its interviewing practices and to institute an affirmative action programme to increase the number of women in its employ.

PROVING DISCRIMINATION

Grievers in academic institutions often allege, not merely direct or adverse effect discrimination, but systemic discrimination as well. In order to prove systemic discrimination, (discrimination ingrained in the practices and attitudes of an institution) one must usually prove numerous instances of both direct and adverse effect discrimination. Thus, it might be helpful to begin with a description of the necessary elements of direct and adverse effect discrimination and the evidence which can be adduced to prove them, and then to move on to some general comments about proof in systemic discrimination cases.

PROVING DIRECT DISCRIMINATION

As noted earlier, in order to prove direct discrimination, it is **not** necessary to prove intent in the sense that the respondent consciously intended to discriminate. The Supreme Court of Canada in O'Malley (supra at 331) has stated:

> "To take the narrower view and hold that intent is a required element of discrimination under the [Ontario Human Rights] Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive...Furthermore, as I have endeavoured to show, we are dealing here with the consequences of conduct rather than punishment of misbehaviour. In other words, we are we are considering what are essentially civil remedies. The proof intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing Human Rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof."

What must be proven, then, is not conscious intent but a causal relation between the impugned action and a prohibited ground (for example, race or sex). The prohibited ground need not have been the only/ primary reason for the impugned action or decision in order to establish a causal relationship, but, it must have been an "operative element".[186]

Evidence adduced to prove the causal relationship required in direct discrimination may include:

[1] admissions and other forms of "direct" evidence

> for example, exclusions based on overt expressions of prejudice, exclusions based on unwarranted solicitude or paternalism, exclusions based on stereotyping, exclusions based on supposed economic loss or employee disgruntlement; or

[2] circumstantial evidence

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[186]. R v Bushnell Communications Ltd. (1974), 1 O.R. (2d) 442 (Ont. H.C.), aff'd (1974), 4 O.R. 288 (Ont. C.A.) At 290; Fast v Hanfold Expeditiing B.C. Ltd. (1985), 6 C.H.R.R. D/2507 at 2510 (N.W.T.).

> for example, prejudiced attitudes and statements, evidence showing that treatment of individuals from designated groups was different from treatment of individuals from non-designated groups, similar fact evidence, evidence of under representation or patterns of exclusion (note: this kind of evidence may be most important in proving the more subtle forms of direct discrimination, for example, "chilly environment" forms), evidence of subjective evaluations or interviews, evidence of an employer's failure to give a credible explanation foe exclusion.[187]

The complainant bears the legal or persuasive burden of proving the essential elements (i.e., causal relationship, operative element) of direct discrimination.[188] However, the complainant is assisted by a reversal of the evidentiary burden of proof once he or she has established a prima facie case of direct discrimination.

What constitutes a prima facie case of direct discrimination varies from context to context. Essentially, one must adduce enough evidence to entitle, but necessarily to oblige, a reasonable decision - maker to decide in one's favour. As an example, in a hiring context, a *prima facie* case is made out by proving:

- that the complainant belongs to a group against whom discrimination is prohibited;
- that the complainant applied and was qualified for a job the employer wished to fill;
- that, although qualified, the complainant was rejected.[189]

It is not necessary, in establishing a *prima facie* case, to prove that the employer's rejection was related to a prohibited ground: that fact is presumed.

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[187]. See Vizkelety, Proving Discrimination, supra, pp 133 - 167.

[188]. Base Fort Patrol Ltd. v. Alberta Human Rights Commission (1983), 4 C.H.R.R. D/1200 (Alta. Q.B.); Jain v Acadia University 91984), 5 C.H.R.R. At D/2124 and 2130 (N.S. Bd. Inq.); Zarakin v. Johnston (1984), 5 C.H.R.R. D/2274 at 2280 (B.C. Bd. Inq.); Isreali v. Canadian Human Rights Commission (1983), 4 C.H.R.R. D/1616 at 1617.

[189]. Israeli v. Canadian Human Rights Commission (1983), 4 C.H.R.R. D/1616 (Can. Human Rights Tribunal); aff'd (1984), 5 C.H.R.R. D/2147 (Can. Human Rights Rev. Tribunal).

After the complainant has made out a *prima facie* case the "evidentiary burden", or duty to go forward with evidence, shifts to the respondent to show that the rejection was not based, in whole or in part, on prohibited grounds. However, once the respondent has offered an explanation the complainant must still discharge the "legal burden of proof", i.e. prove on a balance of probabilities that the explanation offered by the respondent was false or pretextual.[190] Thus, to some extent, complainants are left with the difficult task of proving the reasons for the employer's conduct; facts which lie within the peculiar knowledge of the employer and which can usually only be proved by inference through circumstantial evidence. As Beatrice Vizkelety observes in Proving Discrimination (supra, at 128-129):

> "This is unfortunate in light of the fact that, by its very nature, [circumstantial] evidence is less reliable than direct evidence. Moreover, extensive reliance upon inferences, which allow considerable subjectivity and discretion on the part of the fact finder, may contribute to uncertainty and indeed unpredictability in the decision -making process, particularly where discrimination is tried by non-specialised instances."

As with direct discrimination, it is **not** necessary to prove intent in order to establish **adverse effect discrimination**, in the sense that the respondent consciously intended to discriminate. The Supreme Court of Canada, writing again in O'Malley, has specifically stated in reference to adverse effect discrimination:

> [Human rights legislation] is of a special nature, not so quite constitutional but certainly more than ordinary--and it is for the court to seek out its purpose and give it its effect. The [Ontario Human Rights] Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or effect of the actions complained of which is

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[190]. See Ingram v. Natural Footwear Ltd. (1980), 1 C.H.R.R. D/59 (Ont Bd. Inq).

> significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.[191]
>
> ...motive would be easy to cloak in the formation of rules which, though imposing equal standards could create ... injustice and discrimination by the equal treatment of those who are unequal....[192]

In the cases of adverse effect discrimination, what must be proven is:

[1] the existence of a rule, standard, practice or policy[193], and

[2] a disproportionately negative effect on a designated group because of a special characteristic related to the group.[194]

Adverse effect discrimination is usually proved through direct evidence of the rule or practice and direct evidence, often statistical in nature, of the disproportionately negative effect of the rule or practice.

SPECIAL EVIDENTIARY CONSIDERATIONS IN PROVING SYSTEMIC DISCRIMINATION

In order to prove that discrimination is systemic and not just an isolated event within an institution, one must adduce evidence which is sufficient in quantity and breadth to show a systemic problem. Statistical evidence establishing the under representation of a designated group within a workplace and anecdotal evidence of the experience of members of the group

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[191]. O'Malley, supra, at 239.

[192]. Ibid at 331.

[193]. O'Malley, supra, at 332; Action Travail des Femmes, supra, at 209.

[194]. O'Malley, supra at 332; Action Travail des Femmes, supra, at 209.

may be particularly effective in this regard, and has been accepted by human rights tribunals.[195]

As Walter Tarnolpolsky and William Pentney point out in their book Discrimination and the law,

> ....., the probative value of statistical evidence depends on the size of the sample, variables selected, and the absence of factors tending to show that disparities revealed in a statistical analysis did not arise from any discriminatory practice or reason. Further, the expertise of the statistician may be questioned.[196]

It becomes obvious therefore, that a sound grasp of the legal principles involved in discrimination cases can be an essential tool in handling them and in assessing their merits. It should also be plain that discrimination cases are also complex and their success in any kind of litigation process is difficult to predict. Nevertheless, the important issues of equity and justice that they raise ought to be weighed, as a counterbalancing factor, in favour of allocating scarce resources towards their resolution.

AMERICAN LAW WITH REFERENCE TO CASES

In the *Duke Power* case[197], an employer was accused of violating the Civil Rights Act of 1964[198] by requiring a high school diploma and a satisfactory intelligence test score for certain jobs previously limited to white employees, so as to preserve the effects of the employer's past racial discrimination. The US District Court of Appeals affirmed the position that :

> "...absent a discriminatory purpose, the diploma and test requirements were proper".[199]

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[195]. See Blake v. Ontario (Minister of Correctional Services) (1984), 5 C.H.R.R. D/2417 and Chapdelaine v. Air Canada (1987) 9 C.H.R.R. D/4449; varied 15 C.H.R.R. D/22.

[196]. Tarnopolsky, Walter S. And Pentney, William F. Discrimination and The Law. Toronto: Thompson Professional Publishing Canada, 1994, p. 4 - 56. 18 (2).

[197]. Willie S. Griggs v Duke Power Company 401 US 424, 28 L Ed 2d 158, 91 S Ct 849.

[198]. The Civil Rights Act of 1964 (United States of America).

[199]. Supra on page 158.

Under the US Civil Rights Act[200]employers are prohibited from limiting, segregating, or classifying employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his employee status, because of race, colour, religion, sex, or national origin, even as modified by **Section 703 (h) of the Act (42 USC Section 2000e - 2 (h)**, which permits an employer to give and to act upon the results of any professionally developed ability test provided such test, its administration, or action upon the results, is not designed, intended, or used to discriminate because of race, colour, religion, sex, or national origin, an employer is prohibited from requiring a high school education or passing or passing of a standardizes general intelligence test as a condition of employment in or transfer to jobs when:

[1] neither standard is shown to be significantly related to successful job performance,

[2] both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and

[3] the jobs in question formerly had been filled only by white employees as part of a long standing practice of giving preference to whites.

After much consideration, the Court came to the conclusion that a ***subjective test of the employer's intent should govern***, particularly in a close case, and that with regard to the case at hand, there had to be a showing of a discriminatory purpose in the adoption of the diploma and test requirements.[201] The Court went on to say that in the absence of a discriminatory purpose, the use of the above requirements was permitted by the Act. Accordingly, this did not mean that the above two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related. The more favourable position seems to be the one adopted by one member of the court when he said that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to the job performance for which those criteria are used.

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[200]. Section 703 (a) (2) Civil Rights Act of 1964 (42 U.S.C. Section 2000 e -2 (a) (2).

[201]. Ibid.

Under the Act, practices, procedures, or tests that appear *prima facie* neutral, in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. The act simply maintains that discriminatory preference for any group, minority or majority, is precisely what the US Congress has proscribed. Furthermore, what is required is that artificial, arbitrary and unnecessary barriers should be removed, more particularly when these barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[202] Tests of this nature or criteria for employment or promotion may provide equality of opportunity merely as a theoretical phenomenon. On the contrary, the posture and the position of the job-seeker has to be taken into account - basically that the job - seekers circumstances has to be given due regard. You must deem it imperative that the vessel to be used to that job has to be fashioned in such away so as to promote maximum use from all job-seekers.

It become obvious that not only is overt discrimination proscribed, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.[203] If a practice operates in such a way so as to exclude ceratin groups, and that practice cannot be shown to be related to job performance, then that practice by operation of law becomes unacceptable as well as prohibited. Congress has cast in this way a huge responsibility on the part of the employer in that any given requirement has to has to have a manifest relationship to the employment in question - any test should measure that person for the job and not the person in the abstract. To recapitulate, the above case has set forth two requirements that a test should be able to withstand in terms of constitutional scrutiny, that the employer must show:

(a) that the test is relevant to job performance and

(b) that the effect of the test is not to exclude in a disproportionate way applicants of a particular race group.[204]

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[202]. Discussed generally in the cases of Griggs v Duke Power Supra and Washington v Davis Supra.

[203]. Ibid on page 164.

[204]. Griggs v. Duke Power 401 US 424 (1927) ; Albermarle Paper Co v Moody 422 US 407 (1975).

However this problem was addressed further in the US Supreme Court case of *Washington v Davis*[205]. This appeal was based on whether a :

> "validity of a written personnel test to ascertain whether prospective police recruits had acquired a particular level of verbal skill."

It was alleged on behalf of the plaintiffs that the test discriminated against Black applicants on the basis of race, because the test excluded a disproportionately high number of Negroes, and thus violated their rights under the due process clause of the Fifth Amendment. The particular test in contention was referred to as **Test 21.** There was no claim of intentional or purposeful discriminatory acts, But only a claim that Test 21 bore no relationship to job performance and ***"has a highly discriminatory impact in screening out black candidates".***[206] On the contrary, the respondents argued that there evidence warranted three conclusions:

[1] that the number of black police officers, while substantial, is not is not proportional to the population mix of the city;

[2] a higher percentage of blacks fail the Test than whites;

[3] the Test has not been validated to establish its reliability for measuring subsequent job performance.[207]

The reasoning in the District Court hinged on the notion that a police officer should qualify for recruitment when he has demonstrated the ability to perform the job rather than because of the colour of his skin, and that the Department ***"should not be required on this showing to lower standards or to abandon efforts to achieve excellence."***

The Court of Appeals were swayed by the reasoning offered by Griggs supra. This meant that their conclusion was that a lack of discriminatory intent in designing a particular "Test" was not relevant. Pivotal, under this enquiry is the fact that a far greater proportion of blacks failed

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[205]. 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040.

[206]. Ibid on page 604.

[207]. Ibid.

the Test than did whites. This "disproportionate impact", on its own irrespective of whether it indicated a discriminatory purpose, was sufficient to establish a constitutional violation. "Discriminatory purpose" seems to be the operational factor when it comes to the equal protection principle, ie that racial discrimination must should always be trailed to a discriminatory purpose. In the so called "school desegregation" cases, it has been generally acknowledged that the differentiating factor between de jure segregation and de facto segregation ..... is purpose or intent to segregate.

This does not mean that the necessary discriminatory racial purpose must be express or appear patently on the face of any statute, or that a law's disproportionate impact is irrelevant in cases involving constitution based claims on racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. It is also clear from the cases dealing with racial discrimination in the selection of employees that the systemic exclusion of a particular group of persons is itself such an"unequal application of the law.....as to show intentional discrimination."[208]

An offending discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more poignantly on one race than another. It is also not infrequently true that the discriminatory impact - in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury veneers-may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing in seclusion, it does not trigger the rule as enunciated in *McLaughlin v Florida*[209]. The Courts opinion tended to be along the lines that grounding a decision on the premise of legislative purpose or motivation was unsatisfactory, rather, we should concentrate on the "operative effect" of the law and this should be regarded as bearing an vital function in terms of determining its legitimacy. The holding of the case was that the

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[208]. Washington v. Davis, supra at page 608.

[209]. 379 US 184, 13 L Ed 2d 222, 85 S Ct 283 (1964).

legitimate purposes of the ordinance (to preserve peace and avoid deficits) were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion contained, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.[210]

It has also been held that in appropriate circumstances, the racial reverberations of a law, rather than its discriminatory purpose, is the critical factor. "Both before and after *Palmer v Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications."[211]

In the Washington case, Test 21 was administered generally to prospective Government employees, the motivation behind it being that those who did take the test were in fact equipped with the level of verbal skill that was necessary for job performance. It can be argued that these tests are a reasonable measure adopted by Government in order to be satisfied with the level of competence of its prospective employees, especially since the jobs in question dictated a special ability to communicate both orally and in writing. Accordingly the respondents had no more of a claim than did white applicants who had also failed the test. But on the other end of the spectrum, if there was conclusive proof that more Negroes than whites had been disqualified by Test 21, the conclusion would have to be different. The fact the other Negroes failed the Test or failed to score well does not lea to a an obvious conclusion of that the respondents individually were being denied equal protection of the laws.

On the facts of the case, the Test seems to be *prima facie* neutral, especially since it served a

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[210]. Palmer v. Thompson, 403 US 217, 29 L Ed 2d 438, 91 S Ct 1940 (1971).

[211]. Washington v Davis at page 610.

purpose that Government was constitutionally empowered to aspire towards. The Metropolitan Police, the courts said, had been fair in their efforts (especially with regard to the tests that they subjected employees to), in their recruitment policies, keeping in mind that the Test did serve an important function in that it sifted out the employees who would be able to efficiently carry out their job functions from those who could not. It simply could not be contended that a police officer qualified for a job on the basis of the colour of his skin.

Congress, under **Title VII**, has maintained that in the event of their being instances in which hiring and promoting procedures and practices have been disqualifying disproportionate numbers of blacks, discriminatory purpose need not be proved. These practices need to be validated in terms of job performance. This may be done via the route of ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation:

"Empirical" or "criterion" validity(demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "content" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant).[212]

The above standards have been relied upon by the Equal Opportunity Commission in fashioning its guidelines on Employee Selection Procedures, 29 CFR pt 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue.[213] These

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[212]. Ibid At page 612.

[213]. Albermale Paper Co v Moody, 422 US 405.

procedures then in turn would involve a far too intense investigation and insufficient difference to seemingly reasonable acts of administrators than would be adequate according to Constitutional demands.

On the issue of intent, the most convincing evidence of intent will have to be an account of all objective events leading up to the so called dispute, rather than a involving yourself in an investigation into the subjective state of mind of the actor. It is common cause that an actor is presumed to have intended the natural consequences of his deeds. This is specifically true when investigating governmental action. This is so because action of this nature has been the product of compromise, of collective decision making, and of mixed motivation. It therefore cannot be defended on the basis that such action does encompass a discriminatory intent on the part of the law maker and therefore cannot be challenged on Constitutional grounds. It would not be regarded as fair if the casualty of the alleged discriminatory subjection would be required to uncover the actual subjective intent of the law maker.

It was quite correctly noted in the opinion of the Court in Davis[214] that a very subtle line exists between what constitutes **"discriminatory purpose"** and what constitutes **"discriminatory impact"**. The distinction between the two is hardly noticeable or rather not nearly as distinct as most people would expect it to be. A constitutional issue does not simply arise each time some disproportionate impact is shown, however when the disproportion is of such great magnitude, then it really does not matter whether the standard is phrased in terms of purpose or effect. This leads one to the inference that the Court in the case at hand might have placed to large a margin between what constitutes discriminatory impact and what constitutes discriminatory purpose. They in fact can be seen as different sides of the same coin.

The burden of demonstrating the job-relatedness of an entrance examination should not be disposed of via the use of proof that test scores predict score training school achievement tests. This however would have to be tentative, flowing from the nature of the circumstances of each case. It was concluded in Davis that Test 21 could be validated by a correlation

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[214]. 426 US 229, 48 L Ed 2d 59 7, 96 S Ct 20 40.

between Test 21 scores and recruits' averages on training examinations only if:

[1] the training averages predict job performance or

[2] the averages are proved to measure performance in job-related training.[215]

Furthermore, in *Griggs*[216] it was held that when an employment practice operates in such manner that it cannot be shown to be ***related to job performance***, the practice is prohibited.[217] It went on further to add that once a discriminatory impact is shown, the burden is cast upon the employer to show that the challenged practice ***"bears a demonstrable relationship to successful performance of the jobs for which it was used."***[218] Testing or measuring procedures for obvious reasons have immense value. The problem that arises stems from the incorrect use of these implements. Especially if they are used when not related to job performance. It has been concluded that any tests used in the employment procedure must endeavour towards measuring a person for the job and not simply a person in the abstract. *Albermale* and Griggs shows us that a discriminatory test should be validated through proof "by professionally acceptable methods" that it is "predictive of or significantly correlated with important elements of work behaviour which comprise or are relevant to the job or jobs for which candidates are being evaluated."[219]

An employer should be able to show that the criteria used and considered related to the legitimate interest in job-specific ability, and is therefore justifiable, despite the fact that it produces a racially discriminatory impact. The major practical question is what sort of evidence should be acceptable to prove job - relatedness.[220] He goes on to add that this clearly would have to be determined by a factual analysis coupled with an impartial basis. "The credential or employment test must be validated in manner that convincingly demonstrates that the relationship between the qualification and job performance is not a

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[215]. Davis at page 620.

[216]. Supra.

[217]. 401 US, at 431, 28 L Ed 2d 158, 91 S Ct 849.

[218]. Ibid.

[219]. 422 US, at 431, 45 L Ed 2d 280, 95 S Ct 2362.

[220]. Lustgarten L, *"Indierct discrimination - The Legal Issues"* 1980. pp 43 - 63 .

matter of chance, that evaluations of job performance are themselves reasonably objective, and that groups whose performance on tests and at work are being compared are properly defined."[221]

You cannot limit the whole issue of validation to testing. All prerequisites for employment should be tested to see if they are able to accurately select employees who will perform more efficiently. Flowing from this we can say that when an employer wishes to impose a height or clothing requirement, he has to be able to prove that these requirements have to be satisfied because they either assist in job performance, or that they facilitate in the prevention of safety hazards (or maybe that they are part of the inherent requirements of the job as contained in the Labour Relations Act). [222] Another problem area is when employers require applicants to have a certain minimum amount of years as job experience. What would happen is that a disproportionate number of non-whites would probably end up being excluded because of the test.

Any procedure that an employer carries out that has an adverse impact constitutes discrimination unless it can be justified on the basis of fairness. The use of any selection procedure which has an adverse impact on the hiring, promotion or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with the general inclination of the US Constitution. An employer should consider suitable alternative selection procedures. Should there be circumstances under which there are two or more selection procedures available, which serve the users legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.[223]

Accordingly, whenever a validity study is called for, the user should include, as part of the

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[221]. Ibid.

[222]. Labour Relations Act 66 of 1995, section 187 (2) (a).

[223]. Validity and reliability requirements should apply to all selection modes, including those interposed in executive recruitment regimes. See Robert M. Guion, Personnel Testing, as cited by Elizabeth Bartholet, *'Application of Title VII to Jobs in High Places'*, In - Harvard Law Review, vol 95, at page 945.

validity study, an investigation of suitable alternate selection procedures suitable alternative methods of using the selection procedure which have as little adverse impact as possible, in order to determine the appropriateness of using or validating them. If the user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated, the use of tests or other selection procedures may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of employing it.

The US position in regard to selection tests can be summarised as follows: Selection tests are subject to the disparate impact analysis in that they will be found to be prima facie unlawful under Title VII if it can be shown that they have a significant differential impact on individuals according to their Title VII status. As soon as a plaintiff has illustrated that the above is the result of the selection test, the onus then shifts to the employer to show that such a tests results affect performance on the job. Basically, the employer would have to show the job-related ness of this test, and in so doing would further have to be able to marshall evidence of the validity of the selection test: that is evidence that is an accurate predictor of performance on the type of job in question. What the courts out of necessity would require is that these tests should be validated according to the validation standards of professional industrial psychologists. Finally, where an employer does satisfy the court that a test is sufficiently job-related to justify its use, it then remains open to the plaintiff to establish that there is in fact other alternative selection devices which would just as efficiently meet the employer's business requirements without projecting this discriminatory impact.[224]

It is a firm assertion in Australia that around the turn of the century, considerable interest emerged in the value of applying psychological testing in the realm of job recruitment. The demand for rapid recruitment, classification and mobilisation of military personnel in World War I provided a further motivation to the cultivation of intelligence and cognitive ability

[224]. See generally Washington v Davis and Griggs v Duke Power.

tests.[225] In more recent times, with the emergence of the management discipline of Human Resource Management (HRM), has been seen as a further impetus for the use of these tests. Within the ambit of HRM, lies an significant emphasis on the effect that employee selection and development has on organisational performance. There seems to be a persistent theme of an authentic need to match job applicants to the requirements of the job and to select candidates who will develop commitment to the organisation and fit in with its culture.[226]

Selection tests are seen by most in the coliseum of HRM as making positive contributions toward these goals by providing a greater accuracy and objectivity in hiring and promotion of staff. There has been a long history of controversy as to the fairness of these selection tests. The concerns have included the fact that these tests are culturally biased and tend to discriminate or rather may discriminate against members of minority racial groups or women.[227] Indirect discrimination could occur if a test that purported to measure neutral attribute, such as aptitude for the job, was harder for Aboriginals to perform well upon than for non-Aboriginals.[228] In the US this whole concept of using selection tests has been the subject of huge controversy and extensive litigation. Based on the Civil Rights Act of 1964, being the country's main anti-discrimination statute, the US courts have held that selection tests have a adverse impact on job applicants from minority racial groups.

The case in Australia however is that there are few decisions that have had as their foundation, selection tests under discrimination legislation. We can use the US's experience to accentuate the problems that are experienced with regard to using selection tests, especially since the US has a very well developed set of rules when it comes to the realm of discrimination law. Regardless, it has to be born in mind that there are vital differences between US and Australian discrimination law. This stems from the fact that the definition and interpretation of

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[225]. Davis M, *"Employment Selection Tests and Indirect Discrimination"*, - In: Australian Journal of Labour Law, 1996 vol. 9 p187.

[226]. M Beer, B Spector, PR Lawrence, DQ Mills and RE Walton, Managing Human Assets, The Free Press, New York, 1984.

[227]. Anastasi A, *"Psychological Testing"*, 5th ed, Macmillan, New York, 1982, 56-62 and 341-347.

[228]. Davis M, Supra, p188.

the concept of indirect discrimination has been substantially different.[229] I will now go on to examine the difficulty experienced by Australian Courts in regard to indirect discrimination and the employer's use of selection tests.

The critical point when it comes to selection test based recruitment, is on strategising a selection procedure which allow employers to evaluate the congruity of potential employees essenced on criteria which are pertinent to job performance.[230] What this means in that as your first step in terms of recruitment of new employees, you should be absorbing yourself in identifying the knowledge, skills, abilities, and other attributes (KSAO's) required to undertake a particular job productively. Having identified the criteria for successful job performance, your next phase would entail selecting techniques for identifying whether applicants possess these desired characteristics. In the industrial and personnel psychology literature such techniques are called *predictors* as they are used too predict how individuals will behave on the relevant job-related criteria.[231]

Predictors should ideally should be characterised by :

"Fairness"- their validity should be the same for different sub-groups within the population of potential job applicants;
"Validity" - they should accurately measure the knowledge, skills or abilities which they purport to measure;
"Reliability" - they should give consistent measures over time and across different candidates.[232]

Selection tests despite the promise of greater reliability and validity, are the subject of occasional inaccuracies. Firstly, the identification of the KSAO's have to be correctly

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[229]. Davis M, Supra, p189.

[230]. Gardner M and Palmer G, Industrial Relations and Human Resource Management in Australia, Macmillan, South Melbourne, 1992, pp231-232.

[231]. Ibid.

[232]. Davis M, Supra p191.

identified by employers as being accurate predictors of job performance. So matter how meticulously a selection test measures a particular set of 'KSAO'S', it will not be a valid predictor of job performance if they are not directly pertinent to the job. What this means is that the most important phase in the whole process of recruitment lies in the initial step of job analysis. Secondly, let us assume for argument sake that a job analysis has been conducted, and the relevant KSAO's identified accurately, but the issue of whether the a particular test chosen in fact accurately measures those KSAO's still remains uncertain.

Lastly, there seems to be a potential problem with regard to performance in the test, because of the effect that external factors on the answering ability of people taking the test. These external factors might be totally unnecessary in terms of measuring the level on intelligence related to job performance, but nonetheless be significant factor in the way of a particular employee. For example, intelligence tests may include culturally specific questions which might prove to be more perplexing for members of minority groups to answer correctly, regardless of their level of intelligence. Pen and paper tests generally may be expected to be more difficult for people with less formal education or for those with little experience in taking written tests or who are taking the test in a second language.

Formal selection tests, have been masquerading as neutral scientifically objective measures of assessing job performance. However, these tests can be discredited by cultural and other bias which may impact very differentially upon different groups of job applicants.[233] The Us's concern over the bias of tests was seen in the case of *Allen v City of Mobile*[234]. 'So-called "objective" objective tests were once hailed as the definitive answer to "subjective" often discriminatory, hiring or promotion procedures. But it has become increasingly clear as analysis becomes more sophisticated that there can be other, much more subtle, forms of discrimination lurking in objective testing. It has now recognised that a test can be administered, and the answers graded, and still be grossly "subjective" in the educational or social milieu in which the test is set.'

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[233]. Reynolds CR and Brown RT eds, Perspectives on Bias in Mental Testing: An Introduction To the Issues, Plenum Press, New York, 1984.

[234]. 466 F 2d 122, 123 (1972).

We the have to ask ourselves: "Does the validity of a test as a predictor of performance vary according to the racial, ethnic, gender or other sub-group characteristic of those taking the test."[235] From the point of view of discrimination law, however, the interest with selection tests is not so much their overall validity, but whether they exhibit unfairness or differential validity.[236] A selection test is unfair if it accepts or rejects sub-groups of the general population disproportionately compared with their ability to do the job.[237] This would occur in instances where the validity of a test varies for different demographic groups or for groups that differ in their previous experiences. This in essence entails situations where a test encompasses questions which assume knowledge of incidental information which is less familiar to one segment of the population than to another. Like in America for example where there is clear evidence to the effect that blacks and other minority racial groups such as Hispanics achieve , on average, lower scores on general cognitive ability tests than whites.[238]

THE POSITION IN REGARD TO SOUTH AFRICA:

Our Equality provision does not totally prohibit Government from making classifications and thus treating classes differently, people may be classified and treated differently forę various legitimate reasons.[239] Professor Govender in his Article entitled : Equality, asserts that people in everyday life are taxed on different levels depending on how much they earn. Similarly, convicted persons are sent to jail whilst innocent persons are not, the dental profession is regulated differently to Engineers. But this does not give government carte blanche when it comes to classifications. The position in South Africa also recognises the need for an examination of the criteria to be used in order to make this classification. There has to be a sufficient nexus between the criteria used and the governmental objective that it seeks to enforce. This approach was affirmed in the case of

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235. Reilly RR, *'Validating Employee Selection Procedures'*, - In: Statistical Methods in Discrimination Litigation, eds DH Kaye and M Aickin, Marcel Dekker, New York, 1986, p133.

236. Davis M, Supra p194.

237. Robertson I, *'Personnel Selection and Assessment'*, - In : Psychology at Work, 4th ed, P Wsrr (ed), Penguin, London, 1996.

238. Gottfredson LS and Sharf JC, *'Fairness in Employment Testing'* (1988) 33 Journal of Vocational Behavior.

239. Hogg "Constitutional Law of Canada" At 52.6 .

Prinsloo v Van der Linde and Another:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of the aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8.

Our Equality clause has drawn very heavily from our Canadian counterparts, in terms of its structure and content. However, we have to bear in mind that they were introduced and developed from highly unique situations. They grew whilst receiving stimuli from distinctive historical backgrounds, taking with them a flavour of their specific jurisprudential and philosophical understanding of equality. According to Hogg[240] a law may be discriminatory in three different ways:

[a] **A law may be explicitly discriminatory**. A law which provides that only men are eligible for admission into the armed forces is an example of such a law.

[b] **A law may be discriminatory in effect**. If a law prescribed AA height requirement for admission to the police force and if the effect of such a requirement is to exclude female applicants then the law is discriminatory in effect. Whether this result was intended or not is irrelevant.

[c] **A law may be discriminatory in its application**. A law may be constitutional, but applied in a discriminatory fashion. Thus if the police recruitment procedures led to a disproportionate number of women being rejected then the application of the law would be unconstitutional.

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[240]. Hogg "Constitutional Law of Canada (3rd) 52-53.

The prohibition against both direct and indirect discrimination was intended to cover all the above forms of discrimination.[241] What this in fact suggests is that any law which has an ***"unfair discriminatory impact"*** may amount to prohibited discrimination, notwithstanding the fact that the law in question prima facie appears to be neutral.

Similarly we can look at the case of *Beukes v Krugersdorp Transitional Local Council and Another*[242]. In this case, the council levied a flat rate of charges in respect of services in townships such as Kagiso and Munsieville whilst the residents of Krugersdorp paid a higher user - based levy for services. They argued that they were being discriminated against on the basis of race. The TLC argued that the distinctions were not based on colour but on practical considerations. The court held that while the TLC, did not expressly levy higher charges on whites, it did so indirectly. Because of our history of racially exclusive areas, people resident in the Townships were almost all black while people resident in Krugersdorp were almost all white. The difference in charges therefore had an ***indirect racial impact***. However, the court held that the discrimination was not unfair as it was a temporary interim measure that had to be implemented for practical reasons such as inadequate metering facilities and the long standing boycott by residents of townships.

The above approach seems to overlook the impact of the interim Constitution's prohibition not exclusively on direct discrimination, but on indirect discrimination as well. In terms of **s 8**:[243]

[1] Every person shall have the right to equality before the law and to the equal protection of the law.

[2] No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual

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241. Govender, K. "Equality" , Masters Class Article, 1997.

242. 1996 (3) SA 467 at 480.

243. Constitution of The Republic of South Africa Act 200 of 1993.

orientation, age, disability, religion, conscience, belief, culture or language.'

The success of racially unfair discrimination depends on the applicant, who need not allege that the measure complained of operated with surgical precision against one race only, or that it was designed or intended to do so. The interim Constitution proscribes both indirect as well as direct unfair discrimination. "If the measure has an unfairly discriminatory impact on members on one racial group it may well constitute prohibited discrimination, even if its terms are not directly discriminatory".[244] Janet Kentridge maintains that :
"Indirect discrimination occurs when policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain group.'[245]

She gives us an example of this in another article[246], She uses the example of a pension scheme that may be open to full time workers only. *Prima facie*, there does not appear to be anything sexist about making a distinction between full-time and part-time workers. But on close evaluation you will come to the conclusion that more often than not, a disproportionate number of part-time workers are women who are attempting to combine formal employment with child care. Consequently, a disproportionate number of women are ineligible for pension benefits , and these women are therefore victims of indirect discrimination.

"When a practice, the effects of which are disproportionately detrimental to women, is proved to be justifiable on objective economic grounds, it will not be held to be unlawful. This does not change the fact that the practice has adverse consequences for women. The fact that the practice is objectively necessary to the business does not make it fair to the women who are disadvantaged by it. The point at which such a policy is found to be justifiable is the point at which the law compromises between equality and commercial rationality".[247]

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[244]. Beukes v Krugersdorp Transitional Local Council And Another, 1996 (3) SA P480

[245]. Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman Constitutional Law of South Africa (1996) at 14-19.

[246]. Acta Juridica (1994), Kentridge J, *"Measure for measure: "Weighing up the costs of a feminist standard of equality at work"*, page 92.

[247]. Ibid.

It follows that by focussing on whether the cause of the disparate impact is tainted by gender we are subverting the efficacy of provisions prohibiting indirect discrimination. The essence of the matter concerning the prohibition against indirect discrimination is that it looks to discriminatory consequences, rather than the causes. Even if the cause 'bears no taint of gender', the outcome is discriminatory if disproportionate numbers of women are thereby disadvantaged, and that difference must be objectively justified by the employer.[248] Indeed, if the cause of the disparate impact were 'tainted by gender', it would not be 'neutral on its face'. She goes on further on in the previous article to add that:

"Like direct discrimination, indirect discrimination may be either intentional or unintentional.[249] The facially neutral criterion may be adopted with the intention of screening out members of a particular group; or it may be adopted in good faith and nevertheless have a disproportionate adverse effect on a particular group".[250]

For obvious reasons therefore, the distinction between direct and indirect discrimination cannot be simplified by a simple distinction between intentional and unintentional discrimination. If you have a situation where a party that has made such a law or "test", and they claim that they did not intend for such a practice be discriminatory, they cannot escape liability on that ground. It may not be simplified in that manner. In the Beukes decision the court finally concluded that gross locality based differences in rates and levies which have a racial impact will have to be justified, in future, by gross differences in facilities, services and property values. If they are not, residents may have a Constitutional cause of complaint.

American jurisprudence has taught us that when we look at employment practises, it is the outcome and not the intent that we should concern ourselves with.[251] When are trying to make a determination as to what constitutes discriminatory practises this is what our focal point

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[248]. Ibid on page 105.

[249]. However in the case of a complaint of direct discrimination, there is no need to show intention to discriminate, was demonstrated in the case of R v Birmingham City Council, Ex parte Equal Opportunities Commission (1989) AC 1155 and James v Eastleigh Borough Council (1990) 2 AC 751.

[250]. Supra at note 43.

[251]. See generally Griggs v Duke Power Supra.

should be. Furthermore, an employment practise or policy, however neutral it might appear in terms of intent, and however equitably and impartially administered, should it produce a ***'disproportionate impact'*** on members of a "protected class" (those groups specified in law) or which perpetuates the impact of prior discriminatory practices, would be regarded as unlawful discrimination. With an exception of course that the employer could prove that it is a policy that is compelled by the virtue of "business necessity".[252]In the words of supreme court Justice Warren Burger:

"Under the (Civil Rights) Act, practices, procedures.....neutral on their face, and even neutral in terms of intent...cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices. Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[253]

Employers should run statistics in order to look at the effect of their employment practices. [254] Should these statistics show a highly disproportionate representation of minorities in any job classification relative to their presence in the population or work force, strong evidence of discriminatory practice would be our proved. From this point onwards, the burden should be born by the employer to show that the results do not constitute an overt or institutionalised practise of discrimination.[255] As I have already mentioned, a practice or policy which gives rise to a "disproportionate impact" on groups that are protected by laws, would be able to withstand scrutiny on the basis that it is in place as a matter of business necessity.

Courts have interpreted the whole concept of business necessity very restrictively. What they require is the following: overriding evidence that the discriminatory practice is essential to the prudent and productive operation of the business; or requiring an extreme, adverse financial

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[252]. Griggs v Duke Power Company (1971) 401 US 424. The business necessity requirement was endorsed in the 1991 Amendment to the Civil Rights Act of the United States of America.

[253]. FSA Targeted SELECTION, Participant's Manual. Op Cit. P2.

[254]. Statistical proof may be unnecessary when disparate impact is unmistakable.

[255]. Cf. Griggs v Duke Power Company, supra (Burden on employer to show relationship of selection procedure to job performance. See also St Peter v Secretary of the Army, 659 F. 2d 1133, 1139 (D.C. Cir 1981) - Nichols, J. Dissenting.

impact to be shown. Employment discrimination is class-wide discrimination. This implies that should it be found to be in existence at any particular workplace etc, it must apply to all members of the affected class to which an individual complainant belongs. This concept of "class discrimination" has been very broadly interpreted by the courts.

HOW CAN TESTING/TESTING PROCEDURES BE IN ACCORDANCE WITH CONSTITUTIONAL HUMAN RIGHTS GUARANTEES

Tests should be properly validated and checked for reliability. Testing undertaken by persons who are not qualified to administer or interpret such tests, would be regarded as discriminatory. The whole aspect of cultural fairness needs to be addressed. Researchers need to work on tables that show that there are in fact adequate norm tables that are accessible and that they are being used to take into account cultural and other differences. Furthermore it is important for tests to be constructed in such a manner that it is able to demonstrate that the characteristic that it measures is a pivotal characteristic for the job in question. Questions which are designed to test candidates who are members of one group more vagariously than another should be avoided as should tests or exercises on irrelevant material which may be unfamiliar to members of a particular group.

OTHER CONSIDERATIONS THAT SHOULD BE REGARDED AS BEING INDISPENSABLE FOR SELECTION AND RECREMENT PROCEDURES

[1] Any recruitment programme should contain a complete and objective analysis of what is required for the job;

[2] All skills and qualifications required for the job should be necessary and relevant to the job;

[3] Each candidates skills and qualifications should be compared to the requirements of the job and not against the qualifications of some other candidate;

[4.1] They should be run by and administered by trained recruiters/interviewers/testers;

[4.2] The interviewers and selectors should be familiar with the legal issues that concern interviews, recruitment in so far at it might suggest the operation of indirect

discrimination;

[5] An adequate record of the process should be kept and be made available for easy access;

[6] It should also contain formal regulations, standards and directives concerning its operation;

[7] Should consist of a standardise system that treats all applicants equally;

[8] All tests should be validated for accuracy and relevancy;

[9] All interviews should be free from bias with no room fro it entering the process or programme at any level; **[10]** Interviewees should have the right to have their interviews reviewed by some other member of the organisation to which they are proposing employment with - this member could for example establish the presence of bias by drawing on a longstanding pattern that shows the Company's behaviour to be discriminatory

CHAPTER : 4

Discrimination within the Face to Face Interview and the Role of Employers

THE FACE TO FACE SCREENING INTERVIEW

The traditional face to face interview (hereinafter referred to as the FTFI) is susceptible to many legal challenges. This is based on the rationale that it frequently:

[1] it does not significantly enhance the predictability of performance of the prospective employee, beyond what can be achieved with more objective[256] criteria;[257]

[2] it does not seem to be an accurate means of measuring bona fide occupational/educational qualifications;[258]

[3] it lacks business necessity;[259]

[4] causes discriminatorily exclusionary effects among[260] and within minority groups.

Consequently, FTFI's should be conducted only if they are related to productivity and have therefore been validated. In addition, accommodations to the FTFI should be readily attainable. Traditionally, the FTFI is the final stage of selection. Interviewees are advised to arrive punctually and be fastidiously spruced. Since the strategy is to project one's most favourable image, etiquette is also crucial, including salutations, gesticulations, posturing, and especially punctilious handshaking style. During the interlocution, all questions , however

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256. "Objective" phenomena are quantifiable, and afford negligible interpretational latitude to the percipient.

257. See Equal Employment Opportunity Commission Rules and Regulations: 29 C.F.R. Section 1630.10 (1991) Often Referred to as EEOC Regulations.

258. For the BFOQ concept, see Section 703 e (1) Of Title VII of the Civil Rights Act of the Civil Rights Act of 1964, Stat. 253, 42 U.S.C. sections 2000e-2(e)(1). [Effected a prohibition against discrimination based on race, color, religion, sex, or national origin, and was amended by 86 Stat. 104; and section 4(f)(1) Of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 623 (f)(1) - [Described lawful employer practices].

259. For explications of the business necessity approach, see Title VII, supra note 253, Sections 2000e-2(k)(1)(i) (as a defense to a challenged employment practice with disparate impact.

260. For instance, despite qualifying for high profile positions, a psychiatrically handicapped individual might barely manage to secure a menial livelihood.

probing or offensive, must be answered straightforwardly and unabashedly.

Paradoxically, the candidate also must simultaneously manifest both originality and conformity to selectors'[261] and predispositions. Any deviation from these meticulous expectations is likely to doom the applicant's prospects, notwithstanding superlativeness on all other selection criteria. If that were not enough, physical attractiveness alone may be decisive, since interviewing often degenerates into a tacit beauty contest. What this boils down to is the fact that the FTFI paradigm invites discrimination imputable to factors unrelated to occupational and academic performance[262], including race, gender, ethnicity, age, physical or psychological disability, attractiveness[263],stature, personality, and even historic talent. These glaring correlatives of the FTFI not only jeopardize equal opportunity rights, but also propagate suboptimal workforce allocation.

ARGUMENTS IN SUPPORT OF THE FACE TO FACE INTERVIEW:

Despite its subjectivity[264] and conjectural utility, the FTFI remains ubiquitous for at least four reasons:

[1] Tradition: However, most consuetudinary practices, despite their momentum, are ultimately superannuated;

[2] Expedience: Likewise, many self aggrandizing conveniences such as maybe debarring Black South Africans and females;

[3] Synergy with at will employment: Errant personnel decisions entail less risk in an at will arena than in a labour market abiding by a standard of good faith or fairness.

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[261]. I have used the terms "selector" and "recruiter" to refer interchangeably to interviewers, or more generally to individuals with discretionary authority in selection decisions.

[262]. White v. Secretary of Interior, 51 M.S.P.R. 623.

[263]. Eg. Vuyanich v Republic National Bank, 505 F. Supp. 224, 393 (N.D. Tex. 1980). See also *'Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance'*, - In: Harvard Law Review vol 100 p2035.

[264]. Subjectivity exists when unquantifiable or intangible criteria are assessed, when intuition or judgment is exercised, or when the rater has substantial evaluative flexibility.

Employers adhering to at will policies are prone to loathe FTFI delimitation, since it may be cheaper to have a high employee turnover rate than to invest in unbiased selection procedures;

[4] Superficiality: Many employers imprudently fancy the FTFI precisely because it is eludibly pervaded by extrinsic, arbitrary considerations such as complexion, countenance, semblance, and persona.

Complementing the above factors are proponents' expostulations that the FTFI is necessary because:

[1] they determine whether the applicant has requisite communicative or social skills;

[2] they are needed to obtain supplementary information;

[3] they appraise a candidate's veracity;

[4] they are needed for the selection among equally qualified aspirants;

[5] they help you to make a determination as to the companionability between the applicant and prospective supervisors or co-workers.

Although these arguments are sometimes legitimate, they are inapposite in the majority of selection situations. The concerns of Argument [1] can generally be addressed by combining personal or business references with telephonic or blinded interviewing.[265] Most vocational and and educational positions cannot legitimately justify more than minimal communicational and social skill prerequisites. For confirmation, one has only to behold the outstanding individuals with handi-cap limited oral or social abilities in virtually every field, including those requiring extensive public contact. There are countless examples of productive professionals whose speech or body language is affected by blindness, hearing impairment, stuttering, severe physical disability, or even developmental disability. Be that as it may, such individuals tend to be excluded from high profile positions.

As a result, the FTFI should be limited to those few endeavours such as the dramatic arts, high

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[265]. The Americans have created a system of blinded interviewing/auditioning. The applicant and interviewer are typically separated by an opaque partition. The applicant's voice may be transformed so that pitch and accent indiscernible-thereby reducing the effects of gender, race, ethnicity, and nationality.

level management, and public relations, where extraordinary interpersonal or interlocutionary ability is a bona fide occupational qualification.[266] Admittedly, elimination of the FTFI restrict recruiters inspection of cleanliness and other grooming behaviour, as well as contact, sincerity of expression, and other cosmetic phenomena. Nonetheless, for all but a handful of positions, the probity of such information is likely to be exceeded by he prejudicial impact of conjointly gleaned sensual impressions.[267]

Argument 2 is credible only when it is impractical to obtain vital information without interviewing. At any rate, all relevant selection data can generally be procured from a well-devised application form; a resume or curriculum vitae; reference-checking; testing; and other impartial, impersonal procedures. Even when the FTFI can be legitimized by the impracticability of more objective methods, the interview encounter should be structured to minimize interviewers' exposure to extraneous cues. Telephonic or blinded interviewing will often suffice.[268] These techniques can be far more objective than FTFIs if, for example all interviewees are asked to respond via microphone to an identicle series of predesigned, short-answer questions, and replies are digitally recorded. Then selectors can subsequently refer to each answer whenever desired, and frequency, amplitude, and other voice parameters can be modulated.[269]

Blinded or telephonic interviewing also effectively deters the concern on Argument 3-applicant dishonesty. Besides, other methods of application verification are far more reliable than the FTFI. For instance, work history can generally be authenticated by contacting references, or tenure may be conditioned upon submission of University transcripts.

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[266]. However, the same validity and reliability requirements should apply to all selection modes, including those interposed in executive recruitment regimes. See Robert M. Guion, Personnel Testing, , Cited above in Elizabeth Bartholet (1982). P1027.

[267]. *"Facial Discrimination: Extending Handicap law to Employment Discrimination on the Basis of Physical Appearance"*, 100 Harvard Law Review. 2035, 2052 (1987).

[268]. Cf. Beatrice Bich & Dao Nguyen, Comment, *"Accent Discrimination and the Test of Spoken English: A Call for an objective Assessment of the Comprehensibility of Non-Native Speakers"*, - In: California Law Review, vol 81 page 1325, (1993) - Describing standardized, blinded interview available to applicants for whom English is a second language. See also *"Facial Discrimination"*, supra note , at 2052 n.89 (virtually every American symphony orchestra conducts blinded auditions.

[269]. Beatrice Bich & Dao Nguyen, Comment, *"Accent Discrimination and the Test of Spoken English: A Call* for an Objective Assessment of the Comprehensibility of Non-Native Speakers", - In : California Law Review. Vol 81 1325, 1348 (1993) [Describing standardized, blinded interview available to applicants for Whom English is a second language].

Argument 4 has very little merit since ample valid objective data for ordinal ranking of candidates is generally affordable without an interview. As an example, most collegiate programmes are able to distinguish among applicants without FTFIs. Similarly, consider the United States Civil Service Commission, whose goal has been unbiased, merit-based employee selection since its establishment in 1883[270]. Objective examinations are pivotal to civil service selection, whereas FTFIs are omitted or standardised. Consequently, immaterial factors, such as political affiliation, are less inclined to corrupt decision-makers. Comparably objective selection systems are prevalent among state and local governments, and many private organisations.

Argument 5 is more difficult to negate, at least with respect to nongovernmental employers, who arguably have a right to hire and associate with whomever they choose.[271](Because of the Constitutional guarantee). Some employers contend that the FTFIs help to find amiable employees with whom they feel the right "chemistry". A kindred notion is that as long as at-will employment is the law of the land, any restrictions on the FTFI will increase turnover and lower efficiency, since employers are more susceptible to terminating employees whom they cannot prescreen in person. Perhaps its time to put the chemistry and conviviality precepts to bed, since they indulge an irrational cliquishness at the expense of productivity, diversity, and the long-run ambiance of the organisational environment.

ARGUMENTS AGAINST THE FACE-TO-FACE INTERVIEW

Not only are arguments promoting the FTFI discreditable, but there are many objections to FTFI use, most of which have traditionally been acknowledged dismissively, including :

[1] anxiety and other psychological traumas stemming from competitive interviewing, adversely affecting normally articulate and poised individuals;

[2] the bias of interviewers to focus on immutable traits;[272]

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[270]. Civil Service Act, 5 U.S.C. Section 3301.

[271]. "Congress shall make no law... abridging the freedom of speech..."Taken from the US. Constitutional amendment 1.

[272] When I speak of immutable traits, I am referring to race, color, gender and genetic infirmities etc.

[3] the propensity of the FTFI to encroach upon or supplant more objective selection criteria;[273];

[4] the FTFI's dubitable validity;

[5] illicit consequences of the FTFI, including disparate treatment, adverse impact, and pattern of practice discrimination; and

[6] the FTFI's exiguous cost-effectiveness or .

Each argument will now be explored.

INVALIDITY OF SUBJECTIVE SELECTION CRITERIA

Both the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC)[274] and most industrial psychologists[275] support the view that subjective selection procedures, including the FTFI, should not be immune from validation principles.[276] A selection procedure may be defined as "any measure...used as a basis for any employment [or scholastic] decision, "including "informal or casual interviews."[277] A selection procedure is permissible if it :

[1] has no adverse impact on any impact on any protected class;

[2] is justified by "unusual circumstances," such as business necessity; or

[3] is validated.[278]

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[273]. Assuming that the legitimacy of a selection procedure is inversely related to the extent to which it permits consideration of immutable characteristics unrelated to performance, then any rationale for the FTFI is assailable. See Richard A. Fear, The evaluation interview pp 35-40, 1978.

[274]. EEOC Uniform Guidelines on Employee Selection Procedures (Hereinafter referred to as Uniform Guidelines), 29 C.F.R. Section 1607.16 (1990).

[275]. Bartholet, supra note 261, at 988.

[276]. Griffin v. Carlin, 755 F 2d 1516, 1525 (11th Cir. 1985) (Exclusion of subjective practices from disparate impact analysis encourages employers to use subjective rather than objective criteria).

[277]. EEOC Uniform Guidelines on Employee Selection Procedures [hereinafter Uniform guidelines], 29 C.F.R Sections 1607.16 (1990).

[278]. Uniform Guidelines, supra note 6.

In any event all evaluation systems should be subjected to criterion-related, content, or construct validation.

VALIDATION METHODS

Criterion-related Validity. The preferred method of validation is contingent upon finding a significant correlation between applicants' rating as on a selection criterion and their subsequent performance.[279] Unfortunately, criterion-based validation is sometimes unattainable, because it theoretically requires accepting applicants irrespective of their criterion score, so that a randomized sample of ratings is available for correlation with performance. In such times, it may be necessary to resort to concurrent validation, wherein criterion measurements are made of current employees or students for comparison with their performance history.[280]

Content Validity. Statistical significance testing is not required in content validation, which reflects the extent of resemblance between the selection procedure and actual occupational or academic tasks.[281] To illustrate, a typing test has strong content validity for the selection of typists.[282] In contrast, the traditional FTFI- which measures one's ability to respond tactfully and impressively to an inquisitorial concatenation of interrogatories - lacks content validity for all but a few callings.

Construct Validity. Another technique, construct validation, maps the relationship between abstract qualities and performance. Measure of creativity, intelligence etc, may lack content validity, but may nevertheless predict performance. However, whenever a construct is applied for selective purposes, it should be bolstered by criterion-related validation. Hence, if an employer intends to use the FTFI to evaluate leadership skill, each interviewee should be

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[279]. Uniform Guidelines, supra, section 1607.16F.

[280]. Concurrent validation is typically far less robust than criterion-related validation, particularly if performance predictors are not measured until long after the hiring process.

[281]. Uniform Guidelines, supra, section 1607.16.D.

[282]. Robert M. Guion, Content Validity In Moderation, 31 PERSONNEL PSYCHOLOGY 205, 208-211 (1978).

numerically rated for leadership. Then the nature, if any, of the correspondence between FTFI - rated leadership skill and long-term productivity can be monitored.

INVALIDITY OF THE FACE-TO FACE INTERVIEW

Evidence corroborating FTFI validity is so unremarkable that incantations of business necessity and bona fide occupation qualifications should be addressed with scepticism. Although the FTFI may be improved by performance-related schematization,[283] interview inveterately range from flexibly scripted to improvisational to totally unstructured, and candidates are routinely rated so subjectively that no audit trail survives for subsequent examination of the selection process.[284] Also, interviewers seldom receive more than cursory instruction concerning the purposes and techniques of interviewing, or the methodology for accurately rating interviewees. FTFI proceedings are more often than not, capricious.

DISCRIMINATORY EFFECTS OF THE FACE-TO-FACE INTERVIEW

A face-to-face interview's discriminatory effects may be established in terms of :

[1] disparate treatment-i.e., *intentional discrimination;*

[2] disparate impact- i.e., statistically attestable exclusionary effects upon protected groups caused by facially neutral selection criteria; and

[3] pattern or practice discrimination- i.e., group differential treatment.[285]

Discrimination actions are often fraught with evidentiary difficulties. Both disparate treatment and pattern or practice actions generally require some overt or definite evidence of

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[283]. Reynolds v Sheet Metal Workers Local 102, 498F. Supp.952, 974 (D.C.C. 1980), unvalidated interview rejected for lack of job-relatedness, but interviews that are better tailored may be vindicable. See also Mari J. Matsuda, *"Voices of America: Accent, Anti-discrimination Law, and a Jurisprudence for the Last Reconstruction,* - In : Yale Law Journal, vol 100 p1329, 1333-41, 1361 n.119 (1991).

[284]. Angelo J. Kinicki & Chris A. Lockwood, The Interview Process: An Examination of Factors Recruiters use In evaluating Job Applicants, 26 JOURNAL OF VOCATIONAL BEHAVIOR 117 (1985).

[285]. Pattern or practice discrimination usually requires both the statistical inquiries associated with disparate impact analysis and the the anecdotal evidence of discriminatory intent connected with disparate treatment.

discriminatory intent[286]- yet interviewers seldom impart any trace of prejudicial behaviour. Records of selection interviews may not be retained, so selection rationales may be impossible to elucidate. Coincidentally, applicants rarely request feedback concerning selection procedures, particularly when rejected, because:

(1) organization consider such data proprietary, and will customarily relinquish nothing unless at least threatened with legal action;

(2) most students and job-seekers reconcile themselves to rejection as arbitrariness as inevitable prices of the application game; and

(3) hunting for a smoking gun can be time-consuming, embarrassing, and humiliating.

The informational barricades are so formidable that disparate treatment actions are generally prohibitively costly, absent without inculpatory collateral evidence. This dearth of valid accessible selection data, is particularly constraining in disparate impact and pattern practice cases, where statistical analysis is integral to successful presentation. Efforts are further undermined by judicial ignorance or of intolerance towards statistics. The irony of it all is the fact that illegality may in most cases only be demonstrated via the use of statistics.

Even in cases where a plaintiff uses statistics or anecdotes and establishes a *prima facie* case of discrimination,[287] he retains the ultimate burden of persuading the fact finder that the discrimination was unwarranted, and (in disparate treatment cases) intentional. Thus, despite the dissatisfaction of a selection procedure, there may be countervailing legitimate reasons for rejecting an applicant. I such "mixed motive" cases, the complainant must prove that "but for" the impermissibly discriminatory actions, she (or similarly situated individuals) would have been accepted, hired, retained, or promoted.[288]

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[286]. Hester v. Southern Ry. Co., 497 F.2d 1374, 1381 (5th Cir 1974).

[287]. A *prima facie* case is achieved when the plaintiff establishes a genuine issue of material fact, precluding summary judgment..

[288]. See Price Waterhouse v Hopkins, 490 US. 228.

DISPARATE TREATMENT

Of all selection procedures, the FTFI is most likely to function as a vehicle for concealment of bias or disparate treatment.[289] An applicant can establish a case of disparate treatment by persuading the trier of fact that:

[1] he is a member of a protected class;

[2] he was qualified for a position;

[3] he was rejected, and;

[4] the interviewer [subsequently] accepted another individual.[290]

The burden of production then shifts to the interviewer to establish a genuine issue of material fact as to whether there were legitimate, nondiscriminatory reasons for his actions.[291] If the interviewer fulfills this rather unexacting requirement, then the applicant must persuade the trier of fact by a preponderance of the evidence that the interviewer's explanations were pretextual,[292] or that the interviewer intentionally acted discriminatorily.[293]
Gender-and age-based disparate treatment actions are likely to fare better, because overt sexism and ageism remain prevalent among interviewers-at least behind closed doors. For example, an interviewer might :

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[289]. Payne v. Travenaol Laboratories, Inc, 673 F. 2d 798, 817 (5th Cir. 1982). - subjective interviewing induces intentional discrimination.

[290]. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 792-793 S.Ct 1817, 36 L.Ed.2d 668 (1973).

[291]. Ibid.

[292]. Plaintiff may demonstrate pretext either: (1) directly, by showing by showing that the interviewer's actions were more likely motivated by prejudice, or (2) indirectly, by showing that the interviewer's preferred explanation is worthy of credence.

[293]. Eg. Turnes v AmSouth Bank, 36 F. 3d 1057, 1062 (11th Cir. 1994).

(1) intimate to fellow employees a preference for male applicants; [294]

(2) ask a female applicant:

[a] what she would do if she married or became pregnant,[295]

[b] whether her husband supports her employment plans, or[296]

[c] whether her children might be harmed by her work schedule;[297]

(3) make enquiries indirectly educing an applicant's age, remark about the employment seeking difficulties of older applicants, or indite evaluative comments with ageist connotations. Such queries or comments do not always constitute disparate treatment, such queries have to be based on some legitimate purpose.

DISPARATE IMPACT

Disparate impact (also known as adverse or disproportionate impact) occurs when an apparently neutral selection procedure, such as an interview, tends to have impermissible, statistically confirmable discriminatory effects upon minorities, or among individuals within minority groups. This implies that despite the lack of discriminatory animus on the part of an interviewer, and even when affirmative action results in proportionate representation of minorities within a workforce or student body, the FTFI may be found to have an impermissibly discriminatory exclusionary effect upon identifiable classes of individuals.[298]

Although FTFI-induced disproportionate impacts are rampant, the FTFI remains firmly

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[294]. See generally the case of Barbano v Madison County, 922 F.2d 139, 143 (2d Cir. 1990)

[295]. Contra King v Trans-World Airlines, Inc., 738 F.2d 255, 257 (8th Cir 1984), *prima facie* case of discrimination where female applicant asked about pregnancy, childbearing and children. Also important to note in this regard is the fact that the New Labor Relations Act of 1995 stipulates that even with regard to dismissals, it would be regarded as unfair if the reason is related to existing or intended pregnancy. See http:/www.Irnet.Co.Za/special/index.htm.

[296]. Bruno v City of Crown Point, 950 F.2d 355 (9th Cir. 1991), *prima facie* case of gender discrimination where female applicant queried about husband's approbation.

[297] King, supra.

[298]. Connecticut v. Teal, 457 US 440.

entrenched, sustained in part by a practice of dubitable tenability-affirmative action "stop gapping".[299] In such a *"bottom-lining"* or "quota-filling" scenario, an applicant's objective uncompetitivenness is typically counterpoised by inflated ratings on invalidated criteria, particularly the FTFI. When an ostensively neutral selection procedure, ordinarily subject to disparate impact analysis, is deliberately used for non-neutral purposes-such as to meet racial representation goals or screen out the psychiatrically handicapped- then disparate treatment analysis may be appropriate.

This policy may be rationalized as recognizing triumph over socioeconomic barriers, or as fostering heterogeneity in a labor force or student body.[300] Just the same, the consequence of such recruitment practices is disproportionate exclusionary impact upon two subgroups:

(1) rejectees among affirmatively recruited minorities who:
   [a] are more competitive than other minority group members on validated criteria, but
   [b] receive unfavorable scores on invalidated criteria;
(2) rejectees who do not represent any affirmatively recruited minority group, but who:
   [a] are competitive on validated criteria, and
   [b] receive unfavorable scores on invalidated criteria.[301]

Thus the effect of basing affirmative action on an invalidated FTFI- or any dubious selection method-is to unjustifiably create a preferred minority subclass, a disfavoured minority subclass, and a disfavoured non-minority subclass.

In any event, *prima facie* evidence of such disparate impact is rebuttable on several grounds, including: a smaller proportion of qualified individuals within the minority group in question than within the entire recruitment population, improper specification of the recruitable population, business necessity, bona fide seniority system,[302] and lack of causation.[303]

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[299]. Martha Chamallas, "*Evolving Conceptions of Equality under Title* VII: *Disparate Impact Theory and the Demise of the Bottom Line Principle,* 31 UCLA L. REV. 305, 359 (1983).

[300]. See University of California v Bakke 438 U.S. 265.

[301]. The latter rejectees are informally denoted "reverse discrimination" victims.

[302]. See the case of Accord International Brotherhood of Teamsters v United States 431 U.S. 324 (1977).

Despite the availability of such defenses, recruiters should strive to minimize disparate impact liability by circumstantiating the validity and performance-relatedness of all selection criteria. Nowadays, any written test employed will be carefully scrutinized for productivity-related validity. In contrast the FTFI-although far less objective than most written tests-continues to elude scrutiny.

Progress may depend upon greater attention to the FTFI's adverse impacts among policy makers, governmental administrators, and the judiciary. For example, when the validity of an interview is at issue in an adverse impact challenge type situation, instead of deferring to the selector, courts should consider :

"[1] what level of communicative ability the job (or academic programme) requires, and
[2] whether the employer (or school) made a valid determination of whether the applicant or employee met the qualifications,"[304]

Our law should evolve far enough to allow the fashioning of an irrebuttable presumption of discrimination by merely revealing that the recruiter failed to validate selection criteria in accordance with essential skills.

PATTERN OR PRACTICE DISCRIMINATION

Like disparate impact, *prima facie* pattern or practice discrimination is evidenced by statistically significant historical under representation of a protected minority.[305] Additionally, anecdotal evidence of the purposes, anticipated effects, and validity of selection criteria may sometimes be enough for a winning case. Pattern or practice litigation is more likely to succeed via class action rather than individual action, not only because statistical proof of disparate impact is expensive, but also because of the exigency of anecdotal affidavits. That

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[303]. Hopkins, supra at 237 ("but for" Or legitimate nondiscriminatory motive defense).

[304]. Carolyn R. Mathews, Comment, *Accent: Legitimate Nondiscriminatory Reason or Permission to Discriminate?*, 23 ARIZ. ST. L.J. 231, 256 (1991).

[305]. Hazelwood School District v United States 433 U.S. 299, at 303.

is, averments of a pattern or practice of disparate treatment will probably fail when statistical findings are not buttressed by recitations of specific discriminatory acts against minority group members.

COST-EFFECTIVE ALTERNATIVES TO THE TRADITIONAL SELECTION INTERVIEW

Since business necessity implorations for the traditional selectional FTFI, recruiters should seek more objective substitutes. Accordingly, telephonic, blinded, or standardized interviewing should be considered where interpersonal skill or congeniality cannot be adequately surveyed from CV's and references. Better still, naturalistic performance simulations will achieve levels of content (and criterion-related) validity unattainable from the FTFI.

The most effective way to accommodate all applicants, is to ensure that all selection criteria are:

[1] necessary to measure bona fide occupational qualifications,
[2] validated, and
[3] the least biased feasible means- such objectives generally require a job analysis, involving the contributions of personnel specialists, industrial psychologists, supervisors, and/or preexisting job descriptions.

Such quality assurance of evaluation procedures can achieve at least three goals:

(1) a more streamlined, efficient, and cost-effective selection process;
(2) selection criteria which conform to the New Labor Relations Act of 1995; and
(3) enhanced adaptability to applicants' reasonable requests for accommodation.

The face-to-face selection interview is regularly used as a selection procedure, despite the fact that it is infrequently valid or validated, and is generally unsystematically administered by

untrained evaluators. Because of its excessive subjectivity, the FTFI is a vehicle for arbitrariness and discrimination toward nearly every minority. Therefore, FTFI use should be proscribed unless the selector: establishes necessity; employs an FTFI design which minimizes discrimination and maximizes validity; proffers reasonable accommodations, including feasible FTFI alternatives; maintains medical confidentiality; promotes organizational awareness of disability-related problems and accommodations; and tenders to any rejected interviewee, upon request in a timely manner, a fully documented explanation for the adverse selection decision.

EMPLOYER RESPONSIBILITIES

As an employer you owe your potential workforce certain benefits. These should include the following:[306]

[1] The development an of an accurate, informative job description. CV's should be reviewed and a short list selected. This should be followed by an interview with the object of choosing qualified candidates for the appropriate available positions;

[2] The establishment of clear work objectives with the employee at the beginning of the work term;

[3] Provide proper orientation to properly acquaint the employee to his/her new location, organization and duties;

[4] Compensate employees with fair remuneration for work performed;

[5] Supply progressively more challenging tasks and responsibilities as employees progress through the work experience placement;

[6] Monitor and offer feedback on the employee's progress;

[7] Communicate with the person in charge or employees in order to evaluate the employee's performance;

[8] Consultation with Operative and Officer Trade Unions on equality issues;

[9] Provision of equal opportunities training and guidance for Senior and Front Line

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306. See article entitled *"Update on the Labor Relations Act"*, Authored by Robin Carr & William Berry at Internet site Http://www.mbendi.co.za/werkmns/wkemp - 01 . htm # 3.

Mangers and key support Officers especially those with decision making authority;

[10] The establishment and implementation of procedures for dealing with complaints and incidents of discrimination;

[11] A complete and effective ban on discriminatory and offensive literature, posters, and pictures on site, in offices and at all other premises belonging to the Company/Organization;

[12] Regular review of recruitment, promotion, transfer and training procedures;

[13] Accurate computerized monitoring of the composition of the workforce

[14] Development of Equality Targets which should be included in employment contracts and corresponding Action Plans which include positive action initiatives;

[15] Provision of flexible working arrangements, voluntary sabbaticals and job share.

It should be every employer's responsibility to ensure Equality of Outcome, that is, all customers receive high levels of service and quality. There is, my opinion a direct link between equal opportunities in recruitment, selection and employment and quality in service delivery, that is, between the people that are employed and the service that is eventually delivered. Good equal opportunities practices in employment have direct impact of the ability on the workforce to deliver services in an equitable way. Recruitment, training, appraisal and organizational practices should ensure you have the right Person doing the right job. By implementing effective equality of opportunities policies in employment, a skilled workforce will be developed, and this workforce would also be representative of the community that we live in. All of the above will impact on the nature and superiority of your service to the public.

PROTECTING AGAINST EMPLOYMENT DISCRIMINATION CLAIMS

If your association or nonprofit organization has employees, you must concern yourself with applicable laws that govern hiring, firing and conduct in the workplace. The fact that you are a nonprofit organization does not suggest that you cannot be sued for discrimination.[307] Mistakes in how you may treat your employees may prove to be very costly. It is you

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[307]. See article entitled *"Protecting Against Employment Discrimination Claims"* At Internet site Http://www.haspc.com/articles/014.shtml.

responsibility to know the employment laws that apply to your organization, and take adequate precaution to ensure these laws are not ignored or broken. Familiarity with legislative requirements and provisions would further enhance the flavour toward a respect of employees rights. You should know the types of discrimination covered in the statute books as well.

For example the difference between *"direct"* and *"indirect"* discrimination and how it is not only unlawful but actively opposed by the constitution and the New Labor Relations Act of 1995. It ensures that all sections of the community are considered on merit alone in relation to recruitment practices and all should have equal access to its services. Similarly, the rights of individuals are also important. Especially in the sense of hoe they relate to employment and anti-discrimination provisions under the law and the role of the CCMA, NEDLAC etc. You should also in addition guard against falling into the trap of stereotyping your employees. It's important to know what stereotypes are, how they are formed and the dangers associated with stereotyping and making hasty assumptions when recruiting staff and/or ascertaining a client's needs.

In preparing person specifications, you should not unnecessarily exclude potential applicants. Provision should be made for an opportunity to specify particular skills, knowledge and experience eg. Fluency in various languages, experience of working with Black and Ethnic Minority communities, availability of job share and so on. Furthermore, you advertising must be effective enough so as to ensure:

[1] Proper short listing;
[2] Fair interviews and selection of candidates;
[3] Reasonable and justifiable decisions in recruitment.

Significant increases in employment-related claims and litigation present a challenge for associations, professional societies, foundations, and other nonprofit groups, just like they do for their for-profit counterparts. In an already litigious society, job applicants, and plaintiff's attorneys are becoming increasingly aware of the rewards that can come their way when an

employer overlooks or misapplies an applicable employment or civil rights law. Being nonprofit is not a defense to discrimination suits. Association executives must acquaint themselves with various employment discrimination laws which apply to their organization, furthermore, they need to ensure that they are not exposed to unnecessary liability because of the way in which they deal with or treat their employees and job applicants.

It is illegal to retaliate or discriminate against an employee who seeks compliance with a wage and hour, or health and safety law. Likewise, it is not uncommon for a plaintiff to include a delict count in a discrimination suit in order to recover greater damages. Many suits for sexual harassment also allege the infliction of emotional distress. Nearly all countries have enacted their own fair employment practice laws, sometimes referred to as human rights laws. These laws often extend protection to classes of individuals not provided for anywhere else.

STAFF TRAINING

Staff within any Company should be afforded the appropriate training to ensure that services provided are equally and fairly and recruiting officers have also received extensive training. Issues to be covered should include all of the above. Furthermore incentives in the form of awards should be presented to employees who strictly adhere to the above. A combination of effective equal opportunities training and accurate monitoring and record keeping will ensure that South Africa translates its commitment to equal opportunities and anti-discrimination into qualitative and quantifiable progress.

SIX PROPOSED QUESTIONS TO ASK COMPANIES TO TEST THEIR COMMITMENT TO FAIRNESS AND EQUITY:[308]

Question One :

Is it your policy as an employer to comply with the statutory obligations under the

[308]. See Internet site Http://194.70.69.3/tagish/ncc_ eqop/six_ qtns.htm.

Constitution and LRA of 1995, and accordingly, your practice not to treat one group of people less favourably than others because of their color, nationality, ethnic origin, sex etc in relation to decisions to recruit, train or promote employees?

In general employers who have implemented sound equal opportunities policies will be able to answer "yes" to this question.

Question Two:

In the last three years has any findings of racial discrimination been mad against your organization by any court or industrial tribunal?

This question simply asks whether a court or industrial tribunal has found your organization guilty of unlawful racial discrimination during the three years prior to the date the questionnaire is completed. Your answers could be counter checked by records kept by the courts and the industrial tribunals.

Question Three :

In the last three years has your organization been the subject of a formal investigation on the grounds of alleged unlawful discrimination?

This question asks whether any investigation has been carried out, whatever the outcome, The fact that an investigation has taken place does not necessarily mean that discrimination has occurred, the circumstances and outcome of any such investigation will be carefully noted.

Question Four :

If the answer to Question Two is in the affirmative, in relation to Question Three, an adverse finding was made against your organization, what steps did you take in consequence of that finding?

If a firm has been found to have committed unlawful discrimination by a court, industrial tribunal or by some investigation by fore example the CCMA, they will be expected to take steps to ensure that discrimination is eliminated or does not occur again.

The Court, tribunal etc investigators would have made recommendations to he firm as to how it could remedy the situation. A comparison should be drawn between the steps the firm has taken against those recommended. If the firm has not taken action, or has taken action which proves to be inadequate or unsuitable in relation to the recommendations, they should be excluded from the protection and benefits of the Constitution as well as the LRA.

Question Five :

Is your policy on race relations set out:

* in instructions to those concerned with recruitment, training and promotion;
* in documents available to employees, recognized trade unions or other representative groups of employees;
* in recrement advertisements or other literature?

This question would tell a court or tribunal, whatever the case might be, how a particular organization sets out and communicates its race relations policy both to its own workforce and to people who may wish to apply for jobs with the firm.

A few points on this:

* A firm should be required to supply documentary evidence to support their answers to these questions.
* Depending on the size of the firm, their approaches to the implementation of equal opportunities may vary, and may respond to questions of this nature in different ways. The same level of documentary evidence will not be expected of firms which are

clearly very different in size from the others.

* Our expectations of firms of different sizes are based on the requirements for compliance with equality contract conditions which also vary according to the size of the firm.

* Information on the elements of equal opportunities policies and practices should be provided to all forms, or should be made easily accessible to all firms.

THE SORT OF DOCUMENTARY EVIDENCE THAT SHOULD BE LOOKED FOR IS

- Instructions to those concerned with recruitment, training and promotion:

* documents which detail the firm's policies in respect of recruitment, training, and promotion as issued to and used by the managers, supervisors, personnel officers etc., who are responsible for these areas of work. It is important that staff who are responsible for short listing, interviewing ans selecting candidates for employment, training or promotion are aware of your firm's equal opportunities policy and the procedures for its implementation, and that they know how to avoid the effects that assumptions about racial groups can have on selection decisions and how to avoid misunderstandings in interviews. Larger companies are likely to have these policies fully detailed, perhaps as their own Codes of Practice which incorporate their equal opportunities policies; smaller firms may ensure only that such personnel operate in accordance with a written equal opportunities policy.

- Documents available to employees, recognized trade unions or other representative groups of employees :

* Any document which is issued to or available to employees which describe the firm's policy on race relations. This is unusually an equal opportunities statement or policy. At a minimum The equal opportunities policy should include the following- a commitment to equality in employment and a statement that victimization, discrimination or harassment on any grounds are disciplinary offenses. Someone in the

firm has to be responsible for the policy and it should be made public knowledge.

Another possibility is that a handbook or similar document could be issued to all employees, and an arrangement could be reached between trade unions or other employee groups or organizations to communicate the firm's policies, or you may pin a copy of your statement to the company notice board.

- *Recruitment advertisements or other literature:*

* This part of the question relates to how you communicate your general equal opportunities policy to the population from which you recruit its workforce. The information may be included in advertisements for jobs. For example we now commonly see the following statement : *"We are an equal opportunities employer"*, and in promotional and information material (e.g. brochures) issued by the firm.

Question Six:

Do you observe the guidance offered by the Constitution and the New LRA, which gives practical guidance to employers and others on the elimination of discrimination and the promotion of equality of opportunity in employment, including the steps that can be taken to encourage members of minority groups to apply foe jobs or take up training opportunities?

The answer to this question would supplement the whole process of gaging the non-discrminiatory nature of a particular company, specifically with regard to the encouragement of fair opportunities for all within the context of recruitment.

The court in the case of *United States of America v Bricklayer Local*[309], the standard for interviews was set out as follows:

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[309]. United States District Court, Western District of Tennessee, Western Division, No C - 71 - 65, November 29, 1972 and January 26, 1973.

[1] each applicant should be interviewed in regard to such factors as motivation, ambition, interest in trade, willingness to accept directions, attitude toward related instruction, and other such factors which are part of the total judgment,

[2] adequate records must be kept, including a brief summary of each interview and conclusions on each factor considered,

[3] the final weighting and credit factors had to be approved by the plaintiff.

An employer will ultimately still retain the right of determine what the entire recruitment process should entail. However, he should also bear in mind when so doing, that process can be made the subject of Constitutional validation challenges (It will have to comply with Section 9 of the final Constitution). The Equality clause in essence tries to strike a balance between equality of opportunity, and bias that might be pre - existent at the time of the hiring.

Employment equity centers on a ban on unfair discrimination of any kind in hiring, promotion, training, pay, benefits and retrenchment, in line with Constitutional requirements. Employers are encouraged to undertake organizational transformation to remove unjustified barriers to employment, and to accelerate training and promotion for individuals from historically disadvantaged groups. In order to achieve these ends, employers must set up non-discriminatory procedures for hiring, promotion, remuneration, selection for training and retrenchment, primarily by communicating possibilities more evenly and by establishing clear, justified criteria for the relevant decisions.

In consultation with employee and other stakeholders, employers should develop an Employment Equity Plan that lays out measures to reduce barriers to historically disadvantaged groups; accelerates training and promotion for people from historically disadvantaged communities; and provides key indicators of success in ensuring equity. Furthermore, all employers should be required to report on employment and training in terms of race and gender, so that society can monitor the success of these policies in transforming

employment.[310] The core proposals for employment equity include anti-discrimination measures, which should apply with no exception; the development of plans by the organizations affected - the planning process lets employers, in consultation with major stakeholders, address their particular constraints.
Government will develop programmes to support and monitor progress, and will intervene to protect individuals from discrimination in the workplace. It will build on the provisions of the 1995 LRA as well as new policy initiatives aimed at expanding human resource development. Employment equity does not provide a panacea for all the levels of past discriminatory policies. To succeed, it must form part of a broad complex of measures that enhance overall social and economic equality in ways that support productivity, democracy and diversity.

These measures include the new framework for training, improvements in education, a dramatic upgrading of infrastructure in historically disadvantaged communities, reconstruction of the economy to support expanded employment and self-employment, and enhanced multilingualism. Discrimination in employment becomes possible when employers make decisions about employees' careers. Key points for decisions about employees, either as individuals or in groups, are hiring, setting pay and benefits; promotion; grading; selection for training; and retrenchment. Measures to prevent discrimination generally use fairly standard techniques to make decision making more open and accountable. Typically, anti-discrimination policies require that employers:

* ensure that all potential candidates, and especially those from disadvantaged groups, know about opportunities as they arise, generally by advertising appropriately;
* define and communicate clear, non-discriminatory criteria for their decisions, for instance, about promotions and appointments;
* provide equal pay and benefits for equal work;
* give reasons for their decisions in these areas in terms of the stated criteria; and
* establish route of appeal to management or to representative communities.

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[310]. See generally the Green Paper on Employment Equity, Supra.

These procedures let employers select the best people for the job. Ant-discrimination measures typically permit only very limited exceptions - usually, as in the Constitution. This broad scope has various reasons. Employers enjoy substantial flexibility because of the recognition that unavoidable requirements for the job may shut out people from historically disadvantaged groups. Furthermore, assessing compliance is fairly easy. Assessing procedures to end discrimination may run into problems defining adequate advertising and appropriate criteria. It is not easy to decide whether an employer has advertised opportunities sufficiently broadly. For an internal promotion opportunity, is it adequate to put a notice on a bulletin board in the staff common room? In the public service, is advertisement of senior managerial positions in the national English sufficient? Must family-owned business advertise before they hire family members?

More fundamentally, whether consciously or not, employers may rely on criteria that do not reflect genuine needs for the job. Such criteria may not explicitly mention race, gender, or other personal characteristics. But they may nonetheless impose an extra burden upon members of a particular group. For instance, demanding that people be fluent in English and Afrikaans excludes many Africans from employment, promotion or training. Often, however, the work itself does not require fluency in both languages. Indeed, performance might be improved by acquaintance with other languages altogether. Similarly, requiring that candidates for physical labor be tall or heavy effectively excludes most women, without giving them a chance to demonstrate their abilities.

It seem like employer are in for a tough time. They will need to ensure that all their recruitment practices are both fair and easily accessible. If not they will have to face the challenge of being axed due to constitutional considerations.

THE BENEFITS EQUAL OPPORTUNITIES FOR EMPLOYERS

'Equal Opportunities' is good management practice. The implementation of an effective equal opportunities policy will achieve the following:

Attract the best recruits -

By providing fair and open access and removing any barriers to employment.

Select the best staff -

By using selection methods based only on the ability to do the job

Maximise the skills and potential of your workforce -
By retaining staff and providing fair and open access to training and promotion

Promote good relations between employees -

By valuing every employee, and by outlawing discrimination, including abuse and victimization

Identify and tackle any discrimination within your company -

By making deliberate discrimination or harassment a disciplinary offence; by taking steps to eliminate any unintentional discrimination; by having non-personnel procedures

Enhance your Company's reputation and its relationship with its customers And the Local community -

By being seen to be a good employer, and by making all staff aware of discrimination and how to avoid it

Comply with all legislation that relates to equal opportunities -

The LRA, and section 9 of the Final Constitution for example

Observe the Codes of practice that support the legislation -

For example the Code of Good practice as contained in the LRA.

THE COST OF DISCRIMINATION

Implementing an equal opportunities policy should not over time incur extra cost for your organization. Discrimination on the other hand, may cost you a fortune - in money, high staff turnover and a lower quality workforce. Most equal opportunities procedures are part of good management practice which is beneficial for your firm in itself. In most cases equal opportunities can be achieved within a firm's current resources and staffing. Equal opportunities policies need not be bureaucratic, particularly in smaller firms. Bureaucracy can stifle and equal opportunities policy. Clear and consistent guidelines and procedures will benefit everybody and save money on wasted time and duplicated effort.

An equal opportunities policy brings financial benefits as well:

* recruiting the best person for the job, every time
* training and promoting staff to maximize each person's potential
* reducing the cost of replacing staff by reducing staff turnover: a good equal opportunities employer will keep staff.

CONCLUSION

At the outset of my investigation, I listed the issues of concern that I would be addressing. Firstly, I explored what the purpose of legal intervention against discrimination was. I have come up with the following. The reason appears to be that we need to use law to promote an idea. This idea seems to encompass notions such as equality, ubuntu, and other notions which focus on pressurizing the human mind towards acceptance of each other. The reason for using law, is so as to force people to start thinking differently. Should this task be attempted via some other avenue, then it would take much longer since there are no penalties attached to non - compliance. The advantage of legal intervention against discrimination, seems to be quite obvious: i.e. to deter those against discriminating by providing a legal sanction in the event of a breach occurring.

> "The purpose of legal intervention against discrimination is to deflect ,minimize or change attitudes and behavioral patterns that invade the workplace from society generally. Lord Wedderburn warns that subjective prejudices is not easily susceptible of legal sanction and quotes Lustgarten as saying that we must not build up an exaggerated faith in the efficacy of the law".[311]

But then, is subjective prejudice capable of legal sanction?

Many academics believe that we should not build up an exaggerated faith in the efficacy of law.[312] Our laws may be used to change behavior and social standards. By being forced into behavior, your subjective prejudices become slowly edged away. You in essence develop an acute sense of knowledge since it affects you so much. You learn more and more about what you are dealing with, and come to the inference that many of our prejudices are unfounded - at the root of the whole concept of prejudice lies the notion that the human mind when in ***"the dark"*** or ignorant about something, would rather simply adopt an aloof attitude against the subject in contention or adopt an arrogant attitudes toward it.

This is where the law steps in and plays a very useful and practically efficient role. It forces people to see that what they are doing or practicing is unacceptable - Which I think should lead them to ask themselves the question **Why?** While engaging oneself in this enquiry, one learns the stark reality of the subject matter concerned. So the law becomes the inherent first step that is necessary to catalyze the entire learning process, especially in cases where people are not willing to do so voluntarily.

Law contains the necessary conditions that are conducive towards educating the public, it creates an atmosphere which lets people know in no uncertain terms, what is and what is not acceptable in the society we live in. Subjectively though, you may not really change what you think, however, you may feel less inclined to affect others with you r perception of someone or something. What this means is that take for example, although you might be racist, you will

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311. Rycroft, A. *"Unfair Discrimination"*, - In: Human Rights Yearly Reports, 1990 p372.

312 Lustgarten, Supra.

not openly practice it.

But then is there anything wrong with a Chinese restaurant only hiring Chinese waiters? Or a Portuguese bakery only employing Portuguese bakers? Or a film marketing men's clothing only hiring men? Not necessarily, we have to engage ourselves in an enquiry that allows us to dissect the requirements of the job - maybe being Chinese is seen as an exclusive concept. Sometimes, it might be regarded as an inherent requirement of the job.(I discussed this briefly with regard to the provision that allows for this in the new Labor Relations Act). It is one thing to legislate, and quite another to prove that discrimination has actually taken place. Under this umbrella we would have to determine the difference between *'fair'* and *'unfair'* discrimination. In some cases as part of the job description in itself, discrimination is inevitable. This means that we cannot unconditionally outlaw discrimination completely, because that would entail abandoning the practicality of why such discrimination does in fact exist.

In assessing future developments in developments in discrimination law, it is important to note that legislation in other countries recognizes that to limit the prohibition of discrimination to the employer is to fail to see the full range of potentially discriminatory situations that are linked to the holding of a job.[313] Trade unions, too, can be penetrators of discriminatory practices; for this reason the exclusion or expulsion of persons from a trade union on the basis of race has been brought within the unlawful employment practice definition. Discrimination by a joint labor management committee controlling such aspects as apprenticeship and job training has similarly been prohibited in the United States. It is suggested that these are some of the areas about which our law will have to decide in order to realize the aim of non-discrimination.

In the case of *Ntsangani & Others v Golden Lay Farms*[314] it was held that the retrenchment agreement made provision for an abandonment of the *"last in first out"* principle in cases

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313. Rycroft, Supra, at page 380.

314. (1992) 13 ILJ 1199 (IC).

where special skills were required. The new machinery that had been introduced by the company displaced the need for workers in the company who dealt with tasks demanding lighter work. These persons were all women. If the company were to retrench it's male workforce and retrench them in the 'heavy work' areas with women, would be regarded as untenable. Furthermore, it was also in conflict with a request which the workforce itself had directed to the respondent company; ie to employ male employees for *'heavy jobs'*...

Generally, discrimination is not unfair unless it involves a characteristic necessary for the job.[315] To use an easy example: it is not unfair for a film director to interview only black actors to play the role of Malcolm X in a film; nor is it unfair to recruit only white actors to play the role of Eugene Terre blanche. Likewise, hiring a female to model women's clothes is not considered discrimination. Another recognized ground in which recruiting from only one group is fair is the requirement of the need for privacy. It is common cause that a female would rather be strip searched by another female etc.

What are the legitimate defenses, if any, to discrimination? Employers are not wrong for believing that certain jobs are best suited for certain types of people. This falls under the notion that discrimination could be regarded as fair if it forms part of the inherent requirements of the job - this may be offered as a justification for discrimination[316]

What remedies are therein South African law for discrimination?[317]

[1] s187 of the new **Labor Relations Act**, makes discrimination based dismissals unfair. The penalties attached are very heavy in that the dismissed employee would have to be given **2 years** of compensation [ie the money that he would have earned had he/she been working for an entire 2 years. Sometimes reinstatement or compensation may be awarded.

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315. Benjamin, P. *"Discrimination"*, - In : South African Labor Bulletin, vol 17, No. 4 p78.

316 Ibid.

317 Rycroft, Supra, 1990.

[2] s1 of the **Labor Relations Act** of **1956**, includes the definition of unfair labor practice:

(i) the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed: provided that any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labor practice.

(ii) **s24(2)** of the LRA, which provides that differentiation on the basis of sex, race or color is to be made in an Industrial Council agreement;

(iii) **s51(9)** of the LRA, which provides that no differentiation on the basis of sex, race or color is to be made in licenses of exemption;

(iv) **s8(4)** of the **Wage Act** of **1957** , which provides that the Wage Board shall not differentiation the basis of sex, race or color;

(v) **s34(2)** of the **Basic Conditions Of Employment Act** of **1983,** which empowers the minister to exempt employers with respect to any particular employee or category of employees from one or more of or all the provisions of the Act, but the Minister "shall not discriminate on the basis of sex, race or color";

(vi) **s12(1) (nA)** of the **Mines and Works Act** of **1956**, which empowers the minister to make regulations for candidates for certificates of competency, provided that no distinction shall be made on the basis of race or color [all of the above has been referenced on page 373]

In conducting my study, I intended to demonstrate the true ambit of the law when it comes to discrimination. I will examined this via four chapters in my dissertation viz:

[1] Anti - discrimination Legislation;

[2] Discrimination in Recruitment and Selection;

[3] Discrimination in the Workplace;

[4] Discrimination within the Face To Face Interview and the role of employers.

The importance of under taking research in this field is intensified by the difficulties

highlighted above in, in that there seems to be a dark cloud surrounding the role of the employer with regard to legislative as well as social reform with regard to discrimination in the workplace. Furthermore, since the working community that we live in comprises such a large percentage, and since their proper and proficient functioning affects so many other facets of all our lives, I feel that such a study is not only useful but also at all costs very necessary.

In principle, I have tried expose and direct the past and future role of employers in alleviating the struggles that employee once fought alone!! I have accomplished this by showing how the new Labor Relations Act has also placed a greater onus on employers in more ways than they could ever have imagined. It represented a conscious effort toward such a reality. I have also investigated the extent to which the new Constitution of the Republic of South Africa has dealt with this issue (with particular reference to the **Equality Provision as contained in Section 9**).

In concluding this investigation I have come to the conclusion that we need law to **'help'** police people's moral behavior. It might not be able to do this alone, because of the various reasons that I have outlined in my investigation, but it certainly is the point at which you could start the whole process of reform. Employers and employees will now have to play a roles that they never had to previously, because they were not threatened with the force of law. As much as you need new work policies and proper systems of checks and balances within any work setup, legislation seems to me to be the ***'power'*** that could very well bring about the change that we so desperately need

GLOSSARY OF TERMS

TERMS AND CONCEPTS FOR EMPLOYMENT AND OR EMPLOYMENT PRACTICE

Complaint:

The first step taken by an employee who believes that he or she has been discriminated against. A cmplaint is an allegation of illegal discrimination that is handled through an administrative procedure. A complaint may result when an employee believes he or she has been unfiarly treated because of race, colour, etc. The allegation itself is not proof that illegal discrimination has taken place. The invetsigation that follows the filing of a complaint will determine if illegal discrimination has, in fact, occurred. A person who files a complaint is called a complainant.

Class Compalint/Class Action:

A complaint stated or filed by a group of people who feel who feel that personnel or management policies or practices discriminate against them as a group. Members of the group believe that the characteristic they share—race, colour, religion, sex, national rogin, age, or disabilities the basis for the discrimination. For example, a classs may be made up of women who believe they have been consistently discriminated against beacause of their sex. In such a case, all female employees, past ans present, and all feamle applicants would be included in the complaint. When a class complaint goes to court, it becaomes a class action. As with compalints by individuals, illegal discrimination may or may not have occurred.

Discrimination:

The word discrimination is foten used to mean illegal discriminatory acts. Discrimination simply means noticing the differences between things or people that are otherwise alike, and making decisions based on those differences. We discriminate when we buy one product over another, when we choose our friends, and when we make personnel decisions based on merit

related factors. All these forms of discrimination are illegal and necessary.

However some types of discrimination in employemtn have been made illegal. Illegal discrimination is unfavourable treatment of a perosn by catergory, class, or group rather thanobjective treatment on the basis of merit. The Constitution of The Republic of South Africa regards it to be illegal to discriminate on the basis or race, colour, national orgin, sex, age or handicap. Discrimination can be intentional or unintentional. This can be further explained under *Disparate Treatment and Disparate Impact.*

Disparate Treatment:

Inconsistent application of rules and policies to one group people over another. Discrmination may result when rules ans policies are applied differently to mebers of protected classes.

Disparate Impact:

Disparate impact results whenn rules applied to all employees have a different and more inhibiting effect on women and minority groups than on the majority. For example, nonessential educational requirements for certain jobs can heva disparate impact on minority groups looking for work, as they have often been limited in thei access to educational opportunities.

Ethnic Group:

A group of people who share a common religion, colour, or national origin. Some members of ethnic groups participate in the customs and practices of their gropus, while other do not. Discrimination based on these customs and practices may be illegakl under our law.

Equal Employment Opportunities:

The goal of law is to make some forms of discrimination in employment illegal. Equal Employment Opportunities will become a reality when each citizen has an equal chance to enjoy the benefits of employment. Only job related factors can and hould be used to determine

if an idividual is qualified for a aprticular job.

Job Related:

Essential to job performance. The knowledge, skills, abilities, and experience necessary to perform a particular job. Tests are job related if they test whetеher an applicant or employee can perform he job in question. A rule or practice is job related if it is necessary for the safe and efficient for the performsnce of a particular job. For exmaple, a rule prohibiting employees from wearing loose, flowing clothing around high speed rotating equipment is job related. However, the same rule applied in an office with no ratating rquipment is not job related, and may have a disparate impact on some ethnic minorities.

Merit Principles:

The Human Resource Departments in Company's should establish rules that need to be followed in hiring, promoting, and all terms and conditions of employment. Rules sould be to the effect that selection and advancement shall be made on the basis of an applicant's or employee's ability, knowledge, and skills in fair and open competition.

Minority:

The smaller part of a group. A group within a country or state that differs in race, religion or national origin from the dominant group.

Prima Facie:

This Latin term translates as "on first view", or "at first appearance".In Equal employment opportunity cases, complainants present evidence and arguments to support a claim of discrimination. If those arguments cannot be rebutted with additional evidence, the claim will be supported by the court within further argument. Thus, a *prima facie* case is established.

Numerical Goal:

A target number of qualified women and minorities hired and advanced within a given period of time through an Affirmative Action Programme. A numerical goal is not a quota, as it may not be reached within the first frame. It does not permit the hiring or advancement of

unqualified employees. Numerical goals provide a standard which allows an activity to measure the effectiveness of its Affirmative Action Program. When numerical goals are reached, the percent of women and minority group members working at appropriate grade levels and classifications will be closer to their percentage in the labour market.

Protected Class:

The groups protected from the employment discrimination by law. These groups include men and women on the basis of sex, any group which shares a common race, religion, colour, or national origin; people over 40; and people with physical or mental handicaps.

Quota:

Fixed hrind and promotion rates based on race, sex, or other protected class standards which must bet met at all costs. In extreme cases, the courts have assigned quotas to some employers who have continued to practice illegal discrimination. The agency or any other employer cannot use quotas to reach their affirmative action goals unless a court orders it. Quotas are considered discriminatory against males and other non minority people.

Reasonable Accommodation:

Adjustments and changes an employer must make in the work schedule or work environment to meet the needs of his employees. These changes could be made to allow a handicapped worker to perform his or her job. Widening doorways, installing access ramps, and lowering work tables are all considered reasonablr accommodations fo handicapped workers. Schedule changes that allow employees time of for religious observances are also reasonable accommodations. Adjustments or changes are considered reasonable, if they do not have bad effect on work flow or production.

Under Represented:

Inadequately represented in the workforce of a particular activity. This term is used to describe the extent to which women and minorities are represented in partcular grade levels and job catergories. The percentage of women and minorities in the labour market are used as a standard to determine under representation.

Under Utilized:

To use less than fully; below potential use. This term is often applied to catergories of employees who are working at jobs that do not make use of their skills nd abilities, although thye may have been hired for those skills and abilities. When an employee is consistently assigned to "dead end" jobs, he or she may be under utilized because thye are often seen as able to perform only limited tasks.

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