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**DECLARATION**

I, Maimbolwa Saasa, student number: 200312561 hereby declare that the work contained in this dissertation herewith submitted is my own (original work) and where I have used someone else's idea I have extensively acknowledged the use of such as a source.

Dated and signed on Monday 2<sup>nd</sup> day of November, 2009 at Windhoek.

.....

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**SUPERVISOR'S CERTIFICATE**

I, Yvonne Dausab, hereby certify that the research and writing of this dissertation was carried out under my supervision.

.....

Supervisor's signature

Date:

## **ACKNOWLEDGEMENTS**

It is a great pleasure and honour at this juncture to extend well deserved acknowledgements to a number of persons who have made this paper a worthwhile endeavour as well as a great success. First of all I want to extend all gratitude to God without whom we build in vain for He gives to all a measure of knowledge and wisdom. Thank you for being such a worthy pillar.

Then I would love to thank my parents for availing themselves both financially and emotionally to see to it that I am indeed empowered to build a life for myself. A great deal of appreciation is accorded to my supervisor Yvonne Dausab, for being such a great help in terms of guidance and support. Professor Hinz, is also applauded for a good job well done for taking his time in ensuring that we had the necessary know-how to be present papers of great academic excellence through his year long lectures.

Great thanks to all the people who were interviewed as a means of ascertaining the application of affirmative laws and policies on the ground. One such person is none other than the manager of our great Bank Windhoek.

And all the peers who lent their support and encouragement as I divulged in this very important endeavour, I extend mighty thanks and appreciation.

Great thanks go to everyone else who contributed in various ways in making this paper a worthy one.

# CHAPTER ONE

## INTRODUCTION

### 1.1 GENERAL INTRODUCTION TO STUDY

'We have inherited an accumulated legacy of generations of structured advantage and disadvantage. The primary aims of affirmative action must be therefore to redress the imbalances created by mechanisms within the constitutional framework. We are not asking for handouts for anyone... contrary to the allegations of those who jump when they see their own shadows, it is not our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures we envisage to overcome the legacy of past discrimination, are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now and that those who have been qualified all along but have been overlooked because of past discrimination, are at last given their due.'<sup>1</sup>

Affirmative action is a policy that goes beyond equal employment opportunity by requiring that organisations comply with the law and correct past discriminatory practices by increasing the numbers of minorities and women in specific positions. Swanepoel defines Affirmative Action as 'those proactive remedial measures designed to bridge the gap between formal equality of employment opportunity and substantive equality of opportunity.' By using remedial measures affirmative action assumes a proactive and reorganisation role.

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<sup>1</sup> Nelson Mandela, Affirmative action in a new South Africa at 3.

This is exemplified by the Namibian public services that put in place mechanisms to correct the past imbalances.<sup>27</sup>

This paper examines the policy of affirmative action as contained in the constitution as well as other laws of Namibia that have as their objective the implementation of affirmative action measures as a means to enable access to jobs for indigenous Namibians.

Indigenous peoples can be used to describe any ethnic group of people who inhabit a geographic region with which they have the earliest known historical connection, alongside more recent immigrants who have populated the region<sup>3</sup>.

The concepts underlying the policy will be discussed in view of coming to a conclusion as to whether the underlying reasons and the effect thereof can be said to be justifiable. Therefore understandably in this endeavour first and foremost regard will be had to the existing laws and policies in place that have the aforementioned objective. The justifiability of the laws also pertains to article 23 that upholds affirmative action in contrast to article 10 that seeks to curb discrimination. This constitutes the gist of what the paper seeks to establish. In a nutshell, the question is can the existing laws that seek to uphold affirmative be said to be justifiable in terms of the objectives sought to be met as well as the negative effect of the implementation of the affirmative action laws?

## **1.2 BACKGROUND TO THE STUDY**

The affirmative action policy<sup>4</sup> is better understood when it is put and explained in its historical perspective. When Namibia achieved independence on 21 March 1990 the new government inherited a deeply divided society. Gross inequalities in the distribution of wealth and unequal access to land, education and health characterised colonial Namibia. With the achievement of independence the majority of Namibians expected, at the very least, socio

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2 Swanepoel 'Implications of affirmative action' <http://www.opm.gov.na/pm/speeches/speech1.htm> (accessed on 10/6/9.)

3 Concise Oxford dictionary, edited by Judith Pearsall, 10<sup>th</sup> edition (2001) 720.

4 Jauch 'justice and Reverse discrimination' South African Law Journal (1998) 9 27

economic improvements, education for all, a living wage were some of the demands of those who voted the first democratic government into existence, were met.

The government's task that was not so easy was to transform an ethnically fragmented, economically extremely imbalanced society into a unified state with a more equitable socio-economic structure. Affirmative action was thus portrayed as the instrument to redress the imbalances of the past. Article 23(2) of the Namibian constitution empowered parliament to enact legislation aimed at redressing social, economic or educational imbalances in Namibian society arising out of past discriminatory laws and practices. On the other hand, there is an inherent danger that if both beneficiaries and non beneficiaries are not equally and positively participating in the process of implementation it may endanger the rights of the non beneficiaries' rights not to be discriminated against with respect to their right of access to employment being infringed upon in favour of those persons (predominantly blacks) who were previously denied access to employment. Hence due diligence should be exercised so that affirmative action does not exceed its limits and thus lead to a situation where conflict of interest, disenchantment and civil strife may ensue. By due diligence it is meant is that the implementation of affirmative action laws should not be implemented haphazardly without due regard to the potential or perceived prejudice encountered by the non-beneficiaries with respect to access to employment. In other words, once the objective of affirmative action laws have been substantially met and the indigenous Namibian is able to access employment in the same way as the white population, there implementation of these laws should be terminated. Factors such as these may detract from the justifiability of affirmative action though in view of the present situation whereby blacks are largely disadvantaged, affirmative action via positive discrimination may *prima facie* be said to be a justifiable limitation operating against the rights of the non-beneficiaries<sup>5</sup>. The non-beneficiaries are those individuals who do not constitute the subjects or beneficiaries of affirmative laws and policies.

At independence disparities along racial lines were the overriding features were a small white minority had almost complete control over the economy of the entire country. The country was faced with a dilemma that is still existent today that despite the attainment of majority rule after many years of bitter struggle, economic independence was still concentrated in the hands of the white minority<sup>6</sup>. It is for this reason that the redistributive policy of affirmative action was put in place as a means of redressing this challenge<sup>7</sup>. The

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5 Jauch (note 4 above) 15

legal framework in place to be discussed in detail includes the Namibian constitution of 1990, the Labour Act<sup>8</sup> and the Affirmative Action (employment) Act<sup>9</sup> as well as the Employment Equity Commission.

In view of the above-mentioned it is the fundamental purpose of this study to find out whether or not the Namibian laws of affirmative action or positive discrimination can be said to be justifiable.

The Republic of Namibia was established on the 21<sup>st</sup> of March 1990 as a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all. The new government inherited a society that was deeply divided on grounds of race, ethnic origin amongst other things. Owing to this situation the government of the republic of Namibia enforced equitable employment opportunity measures, for the benefit of the Namibian society at large. To further this aim, policies were plausibly devised and enacted by the Namibian parliament. The policies were modelled more in line with the 1982 principles. Although several reforms were introduced this paper will for purposes of narrowing down the scope of this task deal with three statutes: the Constitution of 1990, the Labour Act No 6 of 1992, the Labour Act of 2005 and the Affirmative Action (Employment) Act No. 29 of 1998.

### **1.3 LITERATURE REVIEW**

According to Grogan, Affirmative action measures are defined as measures designed to ensure that suitability qualified people from designated groups have equal opportunities and

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6 Affirmative Action in Namibia; re-dressing the imbalances of the past? New Namibia books (1998)  
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7 Affirmative Action in Namibia; re-dressing the imbalances of the past? New Namibia books (1998)  
17

8 No 6 of 1992

9 No. 29 of 1998

are equally represented in all occupational categories and levels on the workforce of a designated employer. Employers are compelled by the state to take affirmative action measures where the employer has more than a certain number of employees.<sup>10</sup> In opinion given the vast discrepancies in the poverty levels between particularly the white race and the indigenous Namibian, it was largely befitting for the government of Namibia to make such stipulations to ensure that the indigenous was adequately represented in the workforce.

Affirmative action is of necessity in view of the current position. But it should not become a new form of discrimination but rather should be an instrument to overcome legacies (and still widespread practice) of racism and discrimination.

Thus persons such as Swanepoel<sup>11</sup> correctly contended that that blatantly racist power structures and property relations have gradually been replaced by more colour blind class agendas<sup>12</sup>. This is so to curb the prejudice of the indigenous Namibians that exists as a matter of fact.

Literature review includes a look at the Labour Act<sup>13</sup>. Article 5 of the Labour Act<sup>14</sup> provides that discrimination against the applicant on the grounds of ethnic origin is prohibited and in addition employers must implement affirmative action measures for people from designated groups such as the indigenous Namibians to better access employment. The question that arises with respect to this dissertation is whether the effect of the application of such a

10 J G Grogan Workplace law 5<sup>th</sup> ed South Africa: Juta & Co. 2000.

11Swanepoel 'Implications of affirmative action'

<http://www.opm.gov.na/pm/speeches/speech1.htm> (accessed on 10/6/9.)

12 Swanepoel (note 1 above) 327.

13 No 11 of 2007.

14 11 of 2007.



provision is tantamount to positive discrimination and can be said to be justifiable. In view of the fact that (the still predominantly white) Namibian private companies do not show much enthusiasm for affirmative action policies as a means of seeing to it that article 23 of the constitution is upheld, indicates that affirmative action is necessary at least prima facie<sup>15</sup>. An aspect that somewhat negates the contention that affirmative action is justifiable is the premise that affirmative action does not necessarily eradicate socio-economic imbalances but rather may result in the shift from the cases of race, ethnicity or gender to the basis of class<sup>16</sup>.

Consideration has to be had to the difference between affirmative action and equity as this helps keep the application of affirmative action policies in check and prevents abuse particularly against those who are not beneficiaries of affirmative action. This makes necessitates mention of this facet of the examination of how justifiable affirmative action can be said to be. It's almost 10 years since employment equity or affirmative action was legislated in 1998 in Namibia.

An Affirmative Action Act was passed in 1998, it is not in dispute that there need to be more effective application of affirmative action policies. An affirmative action policy has two motivations: to provide opportunities to previously disadvantaged groups by forcing employers to provide necessary training, and second, to offset discrimination. Namibia must decide how to enforce the Affirmative Action Act, choosing how 'fast' it expects firms to train and promote previously disadvantaged Namibians. These Acts need to be reviewed to be line with recently promulgated Labour Act.

The Employment Equity Commission used these two terms in its reports Employment equity or affirmative action. The difference between the concept of Employment Equity and affirmative action is erroneously seen by some as the same concept. Affirmative action refers to policies intended to promote access to employment aimed at a historically socio-politically non-dominant group (typically, minorities or women).

Motivation for affirmative action policies is to redress the effects of past discrimination. Given the wide range definition of affirmative action and the extent to which it has developed

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15 NEPRU Can Namibia do better? Policies to improve economic performance reducing poverty and inequality: the Namibian Economic policy research unit (1999) 320

16 Jauch (note 4 above).

negative connotation, I want to illustrate the differences between affirmation and employment equity below.

Affirmative action is a specific practice that focuses narrowly on putting members of the designated groups into specific positions and can be achieved through the senior managers in charge of recruitment and promotions. May exist in the form of written policy followed by rote. It is generally viewed as a process of limited duration designated to remedy past. But it will not itself result in employment equity.

Focus must be broadly on changing policies, practices and attitudes as such and must be achieved through the efforts of the entire workforce. Requires commitment and creativity that extend well beyond formal policies.

On the other hand affirmative action has despite cases of success failed to redress the long and tragic history of racism in Namibia.. Given the failure to make a significant imbalance on the fundamental inequalities which continue to permeate virtually every aspect of Namibian society it is essential that we understand the weakness of the dominant approach to affirmative action. To form such as understanding it may be possible to envisage and adopt for ourselves a formulation of action that will provide the necessary framework for achieving equal participation for all victims of non racial, non-sexist and democratic Namibia.

This constitutes some of the literature that will be brought to light in the dissertation

#### **1.4 STATEMENT OF THE PROBLEM**

The reports that have been consulted during the research of this paper show that the affirmative action laws have not been adequately applied in that vast discrepancies of the past whereby the indigenous do not have access to employment are still predominant<sup>17</sup>. This is worry-some in that after the adoption of affirmative action policies years' back there is still no positive move towards redressing the imbalances of the past with respect to access of employment of indigenous Namibians. There have been reports from the Ministry of Labour that are submitted by different employers, detailing their experiences with the implementation of the said policy and what the results of the process have yielded.<sup>18</sup> Generally, the attitude of people towards affirmative action have been fluctuating from enthusiastic support to critical disapproval ever since its inception but even more importantly

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<sup>17</sup> Jauch (1998) 1

<sup>18</sup> The Namibian Labour market Report LaRRI. June 2004

the employers that constitute mostly of non-indigenous<sup>19</sup> persons can be said to have shown a vast amount of reluctance in seeing to it that the affirmative action policies and laws are implemented.

But of significance to this paper other than the underlying reasons as to why this is the case is the question whether the so called positive discrimination involved can be said to be justifiable in terms of the law. This question is entwined with the one which seeks to question whether the situation on the ground warrants the underlying principles that affirmative action seeks to uphold, the main one being seeing to it that the imbalance in the workforce whereby the indigenous are not adequately represented is redressed. Since the reports so far indicate that the discrepancies are still existent this aids as an argument towards the justifiability of affirmative action. However, there are aspects of affirmative action that render it unjustifiable in that inherent in the practice is the danger that the rights of the non beneficiaries of affirmative action such as the whites will be impinged upon if the policies of affirmative action are not kept in check.

As such, after the laws upholding affirmative action are outlined there seems to be tug of war of legal provisions such as the one between article 10 and article 23 of the constitution as contended earlier in the paper. This 'tug of war' is somewhat ironed out though not completely by the operation of article 25 of the constitution. This is in the sense that article 25 provides an opportunity for redress in the instance that the beneficiaries and non beneficiaries' rights to equal opportunity are unreasonably violated. In this way article 25 acts as a check to seeing to it that the application of affirmative action policies are done in such a way that neither exceeds the bounds of the law.

At the same time, other than the importance of the existence of law what is even of more importance is the implementation of the said laws. As alluded to earlier, in view of information gathered it is clear that affirmative action polices have been poorly implemented. This in itself warrants the tolerance of the positive discrimination pertinent in affirmative action policies. But in view of the above mentioned conflicting position the question still stands is affirmative action justifiable? This paper will in all diligence seek to ascertain.

### **1.5 RESEARCH OBJECTIVES OR PURPOSE OF THE STUDY**

This study seeks to evaluate the implementation of affirmative action policies and to see whether the policy can be said to be justifiable in light of whether it has as a matter of fact

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benefitted the designated groups by improving their representation in the workforce, also whether it can be said to be unjustifiable in the sense that it has led to the non beneficiaries rights being violated upon in view of the positive discrimination inherent in affirmative action. Thus the objects of the research are primarily:

- To establish the measures that is in place to support the implementation of affirmative action to date.
- To establish what has been accomplished through the implementation of affirmative action policies warranting its existence
- To establish the adverse effects of the implementation of affirmative action.

## **1.6 RESEARCH METHODOLOGY**

The methodology used is the collection of data is the triangulation method, which involved questionnaires, interviews and literature research. These methods put together gave the author some confidence that the conclusions and the basis thereof will be credible. Also the validity of the results is as a result readily acceptable.

## **1.7 LIMITATIONS OF STUDY**

Due to existing beliefs and attitudes towards race in Namibia this is a very sensitive topic. Thus it was difficult to collect information from interviews who may have felt that their security of jobs may be compromised if they were to give any adverse information about the application of affirmative action in their companies and so it was hard to get a holistic view of the situation on the ground i.e. the actual implementation of affirmative action as a means of ascertaining its justifiability.

It was also problematic that some respondents did not attempt to answer the questionnaires that were given out and so returned incomplete. Though efforts were made to ensure that literature was gathered that is directly useful to the Namibian experience this proved to be a tedious task as most textbooks that talk on the matter are that on South Africa. However, there is a wealth of articles on the matter and the information used was largely comprehensive.

Yet another problem is that affirmative action policies are not widely known in the Namibian society. There is very little information available to especially small enterprises. Hence the author had to place reliance on secondary data such as affirmative action reports and literature.

## 1.8 ORGANISATION OF CHAPTERS

The dissertation is divided into 5 chapters which will be in the following order:

**Chapter one** Consists of a general introduction to the study, background to the study, statement of the problem, research objectives and limitations to study.

**Chapter two** Starts by laying down the relevant laws that will constitute the gist of the discussion as a means of ascertaining the laws in place that have as their object the implementation of affirmative action.

**Chapter three** This chapter will continue the discussion of the legal justifiability of affirmative action. This will involve a discussion of equality and affirmative action on the one hand and discrimination and affirmative action on the other hand.

**Chapter four** an evaluation of the costs and benefits of affirmative action will be undertaken, the need for transformation in view of the current situation (findings), misperceptions and perceptions that need to be clarified via use of legal stipulations as a means of concluding whether it is justifiable. The legal stipulations via their objectives which helps justify the existence of this law will help iron out misconceptions. For example it is erroneously believed that affirmative action laws seek to do away with the requirement of qualifications as a means of gaining access to employment. But in actual fact, the laws does not enable handouts but seeks to overcome the legacy of past discrimination via ensuring that those who have been qualified but have been overlooked are at last given their due.

This chapter seeks to answer the question of the positive changes brought about by the laws and policies of affirmative action and to what extent the said laws have the impact of justifying their existence. Regard will also be had to the negative impact that the application of affirmative actions and policies bring about.

**Chapter five** This chapter will outline the arguments for and against affirmative action i.e. the advantages and disadvantages of affirmative action as a means of ensuring access to employment and conclude whether it can be said to be justifiable. This chapter constitutes the concluding chapter and will lay down the finding as to whether affirmative action can be said to be justifiable.

## **CHAPTER 2: LEGAL AND POLICY FRAMEWORK**

### **2.1 Introduction to the legal framework**

The legal framework which is the basis of this paper consists of our supreme Constitution which expressly promotes the promulgation and implementation of laws and policies that see to it that past discriminations are reversed through affirmative action laws and policies. At the same time in application of affirmative action laws and policies, regard has to be had to the fact that discrimination on the basis of race is prohibited which acts as a check in ensuring that affirmative action laws and policies do not override their objects to such an extent that this constitutes 'negative discrimination' rather than positive discrimination. Regard will also be had to the Labour Act<sup>20</sup> as well as the new Labour Act. Provisions of the Affirmative action (Employment) Act<sup>21</sup> relevant to this paper will also be highlighted. For instance affirmative action has been defined therein and so provides a working definition that will assist in the assessment of the matter at hand.

### **2.2 The Namibian Constitution of 1990**

The Namibian constitution is the supreme law of the country thus all laws and practices inconsistent with it are deemed invalid.<sup>22</sup> By supremacy this entails that all laws in Namibia should be in conformity with the postulates of the Constitution and should not in any way conflict with the constitution and all that it seeks to uphold.

At the onset, it is very important to take cognisance of what article 5 of the constitution states which is of great relevance to the implementation of the laws of Namibia in their entirety. It

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<sup>20</sup> 6 of 1992

<sup>21</sup> 29 of 1998

<sup>22</sup> This is embodied in article 1(6) of the Namibian Constitution.

states that the fundamental rights and freedoms enshrined in the chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.

Article 10(2) of the constitution states that

‘All persons shall be equal before the law’. It further states that no person shall be discriminated against on grounds of sex, race, and colour, and ethnic origin, social and economic status’.

This marked the first attempt by the Namibian government to address equality for all Namibians. By implication, article 10(2) is of the contention that the colonial dispensation that denied equitable employment opportunities to some members of society was to reproached to see to it that laws were in place that advocated for the need to enable the indigenous Namibian to have equal access to employment by redressing the imbalances that existed whereby the minority in pursuance of discriminatory laws and practices of the past currently dominated the labour force. Hence to correct this imbalance equity demands as can be eluded from the constitution that the indigenous people whenever possible be given first option for employment opportunities that avail themselves.

This is expressly stated in article 23(2) of the Namibian constitution that is titled: apartheid and affirmative action. It states:

‘That nothing contained in article 10 hereof shall prevent parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically disadvantaged by past discriminatory laws or practices’.

The above connotes that any discrimination that may be encountered by the non-beneficiaries of affirmative action amounts to a justifiable limitation of their rights and as such justifies the implementation of affirmative action or positive discrimination.

Moreover, the said limitation on the rights of those persons who are not the subjects or beneficiaries of affirmative action laws and policies has been expressly provided in the constitution of Namibia. This is stipulated in article 22 which provides that the limitation of any fundamental rights or freedoms is authorised provided such law that provides for such limitation is of general application and is not directed towards any particular individual. The second requirement is that the law should specify the ascertainable extent of such limitation and identify the articles hereof on which authority to enact such limitation is claimed to rest.

Furthermore, article 25 of the Namibian Constitution provides a check through which both the laws that stand for affirmative action and those that seek to protect the rights of the non-

beneficiaries of affirmative action laws and policies by providing that all spheres of government shall not make any law or take actions which abolishes or abridges fundamental rights and freedoms.

Another way in which article 25 also protects the rights of both beneficiaries and non beneficiaries of affirmative action is through the provision 25(2), which states that any aggrieved persons (which could be either a beneficiary or non-beneficiary) whose right has been infringed or threatened can seek relief by approaching a competent court to enforce or protect such a right.

### **2.3 The Labour Act<sup>23</sup>**

The Labour Act has provisions that stand for the implementation of affirmative action practices. Part 8, section 106 of the Act, focus on affirmative action and complaints in relation to unfair discrimination or harassment. It contends that nothing contained in this part or any other part of this Act shall be construed as prohibiting any employer or person from implementing any employment policies and practices aimed at the advancement of persons who have been disadvantaged in the labour field by discriminatory laws or practices which have been enacted or practices before independence of Namibia.

Thus affirmative action looks at the employer and employee relations by holding up that applicants are employed and that employees are treated during the process of employment fairly without regard being had to their race, creed, colour or national origin as provided in section 106 of the Labour Act and the prescriptions of the Executive Order.<sup>24</sup> Article 5 of the Labour Act<sup>25</sup> provides that discrimination against the applicant on the grounds of ethnic origin is prohibited and in addition employers must implement affirmative action measures for people from designated groups such as the indigenous Namibians to better access employment. Article 5 of the Labour Act no. 11 of 2007 provides that discrimination against applicants on grounds of ethnic origin is prohibited and in addition employers must

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23 11 of 2007

24 No. 11246.

25 6 of 1992



implement affirmative action measures for people from designated groups such as the indigenous Namibian. In essence as regards a comparison of the new labour Act and the old one with respect to affirmative action the provisions are the same and demand the same adherence.

The question that arises with respect to this dissertation is whether the effect of the application of such a provision is tantamount to positive discrimination which can then be said to be justifiable. But since as stated above section 106 requires that in the process of employment no regard will be had to the race or ethnic origin of the applicant in my view this acts as a check that affirmative action be kept within reasonable and legal bounds and should not be applied or abused in such a way that is tantamount to unwarranted discrimination. It is the aim of this dissertation to establish the extent to which this so called reverse discrimination can be said to be positive. In other words is the criteria involved in bringing about this objective be said to be justifiable?

In terms of article 25, the labour legislation meets the criteria needed to be able to be classified as a law of general application in that because it is based on the legally upheld principle of equality, it can not be said to negate the essential content of article 10(2) of the constitution. This is in the sense that equality as implied from the provisions of affirmative laws and policies entails lifting of formal legal barriers of socially caused inequality that have their origin in the past colonial dispensation and apartheid will not be able to continue to encroach on the need for equal opportunity for the sake of the indigenous Namibians who suffered as the result of the inequalities of the past as deduced from the current constitutional dispensation.

A comparison will be made of the old labour Act and the New labour Act with respect to the provisions that have the objective of affirmative action. But the said comparison will be brief because they two Acts are essentially the same pertaining to matters of affirmative action.

#### **2.4 The Affirmative Action (Employment) Act No. 29 of 1998**

The Affirmative Action (Employment) Act defines affirmative action as a set of affirmative action measures designed to ensure that persons in the designated groups enjoy equal employment opportunities at all levels of employment and equitably represented in the workforce of a relevant employer. This definition has strong emphasis on employment equity. It spells out the necessary measures, procedures and systems necessary in realizing employment equity in the workforce. At the same time, definition connotes that affirmative action aims at practising the designated groups by advancing their representation forthwith at all levels in the workforce. One of the groups falling within the group of those called

designated groups includes those that are racially disadvantaged. This category refers to those Namibian races other than whites. Regard has to be had to the fact that the designated groups in Namibia far outweigh the non-designated groups who happen to be white males or racially advantaged males and females.

In 1998, 8 years after Namibia's independence, the affirmative Action (Employment) Act No. 29 of 1998 was promulgated as an Act of parliament. This statute tightened the loopholes that delayed the full implementation of Affirmative Action in Namibia, by setting measures that lead to equitable employment opportunities in the workforce of identified relevant employers. This meant that this set in motion the set measures intended to move along the transition to convey a situation where the formerly disadvantaged now had prospects of being subject to better conditions and in so doing providing positive discrimination to try to eradicate the ills created by the discriminatory regime of past times.<sup>26</sup>

## **2.5 Establishment of the Employment Equity Commission**

Part 1, section 3 of the Affirmative Action (Employment) Act No. 29 of 1998 document led to the establishment of the Employment Equity Commission. Section 4(a) of the same Act, states that one of the objectives of the commission is to enquire into whether a relevant employer has adopted and is implementing an Affirmative Action Plan. Another further question pertains to whether any particular Affirmative Action plan or Affirmative Action measure meets the objects of this Act, and to take the actions prescribed by or under this Act in regard thereto. This is but one of the existing measures in place that aid in the implementation of affirmative action. However regard has to be had to the fact that the situation on the ground in view of the information gathered that indicates how well or how under-utilised affirmative action policies have been applied, indicates that shows that Namibia has one of the deepest social divides. This is based on data collected in the mid 1990s. Namibia had with 0.701 an extremely unequal distribution of income with the

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26 Office of the Prime Minister, Report on the implementation of affirmative action 2000: 84

indigenous Namibian being in the worst position<sup>27</sup>. The 0.701 relates to the earning capacity of the working population of Namibia, which is relatively low.

In respect of the issue of chronic poverty the Namibian case of Barrientos and Hume<sup>28</sup> is of relevance as it shows the vast discrepancies of the position of the indigenous people in comparison to those of German origin. Hence though the law has provided for measures such as the employment commission the unfortunate fact is that implementation is very poor. Hence at this point it may be said that the positive discrimination alluded to which is the result of affirmative action is prima facie justifiable even from a legal perspective. This is in the sense that through the said positive discrimination, the indigenous person is given an upper hand or preference during the process of employment.

## **CHAPTER 3: CONCEPTUALIZING AFFIRMATIVE ACTION**

### **3.1 AFFIRMATIVE ACTION AND EQUALITY**

The purpose of affirmative action is to advance equality in the enjoyment of human rights within societies where there has been in the past systematic discrimination, whether social or political or economical.<sup>29</sup> This part is primarily a conceptual analysis of the issues of

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27 DISS working Paper 'Namibia's post colonial socio-economic (non-) transformation: business as usual?' 2006 306 321

28 Barrientos, Armando & Hume 'Chronic Poverty & social protection' The European journal of development research 2005 1 17

29 A Eide 'Affirmative action in a New South Africa' centre for development studies, University of Western Cape (1992) 4

affirmative action, one such issue is how affirmative action can be justified in view of the right to equality or whether affirmative action and equality are sides of the same coin.

Though affirmative action is not the only way of achieving equality and it is fraught with difficulties and is often controversial, it is justified and necessary in certain circumstances where systematic discriminations in the past have created serious inequalities in the present. For that reason, special measures adopted for a transitional period is recognised in international human rights law as fully legitimate, in some cases states are even under an obligation to take steps in the furtherance of affirmative action policies<sup>30</sup>.

The Universal Declaration of human rights in its article 1 asserts that 'all human beings are born free and equal in dignity and rights.' Though the declaration has been adopted in many cultures and is intended to include equality between members of different races and creeds and any other group of persons to translate this into legal, political and cultural reality is a much more complicated process<sup>31</sup>.

The issue of equality and affirmative action goes to the very core of social relations and political ideologies. The term equality before the law has in a society such as Namibia be interpreted in such a way that cognisance is taken in the previous dispensation whose negative influences are still felt today whereby inequality was rampant. And so the Namibian government saw the need to take steps including legislation to deal with the social, economic rights. In so far as they do the protection provided by law must be made without discrimination<sup>32</sup>. The one major qualification to this is when affirmative action is required in order to accelerate the achievement of equality in fact. I will now examine the different but interrelated approaches to equality as a means of ascertaining when it is appropriate or justifiable to adopt a certain approach. These include non-discrimination, application of social and economic rights based on need and affirmative action narrowly understood.

### 3.2 NON-DISCRIMINATION

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30 Eide( note 18 above) 5

31 Eide (note 18 above) 5

32 id

Article 10 of the Namibian constitution provides that all persons shall be equal before the law and no persons shall be discriminated against on the grounds of sex, race colour or ethnic origin. According to Eide<sup>33</sup> discrimination is invidious treatment which introduces unreasonable classifications within the specific context of the rights concerned. I shall now look at the implication of the definition of discrimination as stated in the constitution. Discrimination as defined in the constitution relates to the prohibition of different treatment on the grounds contained therein. This means that no persons shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social and economic status<sup>34</sup>. However due regard must be had to the contention that not all distinctions or classification constitute discrimination. Only when such different treatment leads to an illegal result or an invidious treatment is such difference forbidden. This means that it is negative to the person concerned. Treatment positive to that person is not discrimination in regard to him or her, but may have a discriminatory effect in regard to others and therefore in relation to them be discriminatory. Preferential treatment for some may be or is discrimination in regard to others. Whether the distinction made is unreasonable must be seen in the light of the right concerned, the purpose for which the distinction is made and whether the classification made had no more harmful consequences for the category of persons concerned than what is necessary in order to achieve the purpose of the classification<sup>35</sup>.

In view of the position in Namibian, any supposed discrimination that may be encountered as a result of the application of affirmative law practices and laws can be said to be justifiable in view of the limitation of fundamental rights clause found in article 22 of the constitution. And so to this extent affirmative action is justifiable in the sense that it is upheld by the laws and policies that seek to uphold the indigenous Namibians right to be adequately represented in the labour or workforce of Namibia for the purpose of redressing the imbalances brought on by past discriminatory practices.

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33 Eide (note 18 above) 9.

34 Article 10 of the Namibian Constitution

35 Eide (note 18 above) 11.

Moreover, the extent of the harm suffered by the non-beneficiaries of affirmative action does not surpass that which is necessary to see to it that the object of affirmative action is fulfilled. Indeed, it can rather be said that in view of the reports<sup>36</sup> assessed in this study it can be concluded that the implementation of affirmative action policies have been minimal which entails that the non-beneficiaries can not at this stage claim to be suffering as a result of the implementation of affirmative action policies and laws. This brings us to the need for affirmative action in view of the need to uphold the economic and social rights of the indigenous Namibian's ability to access employment.

With respect to the facet of non discrimination that should be upheld in the implementation of law and practices that promote affirmative action one ought to be aware of the position of individual rights in contradistinction to equal protection. It seems that the provisions of the constitution that individual rights take preference over group rights. The constitution gives firm guarantees that all Namibians will in future be able to enjoy fundamental rights and freedoms. In plain language this means that all Namibians are protected from overt and covert discrimination. This means that there is a check in place which ensures that the affirmative laws and practices are not implemented excessively with the result that too much discrimination ensues against the non-beneficiaries of affirmative action. Moreover as far as the said discrimination is concerned, according to O'Dowd:

'In the evaluative sense discrimination entails making a distinction on arbitrary and unjustifiable grounds by either discrimination against or in favour of someone. Discrimination can also be described in terms of differential treatment of individuals on irrelevant grounds...' In application to the Namibian situation since the need for affirmative action has been ascertained in view of the wide discrepancies between the non- whites and the whites, the resulting so called discrimination can not be said to be applied on irrelevant grounds as the context of the position as it warrants their application.

Moreover the notions of justice and equality are not discarded in the implementation of the laws and policies that help the indigenous Namibians to acquire access to jobs. This is in view of the fact that though affirmative action involves preferences it cannot include a total exclusion of anyone because of race. Never again should anyone be barred simply because of race from owning property or setting up a business or occupying any post.<sup>37</sup> Indeed any statutes of that kind that were used in the past to oppress the African people would now be

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36 This refers to the reports done by the Labour commission which will be discussed in the paper.

37 Michael Rosenfeld: Affirmative Action and Justice, Yale University Press New Haven 1991.

unconstitutional especially in view of article 95 that stipulates that the interests of all persons and not just certain persons should be promoted by the state.

Furthermore equal protection should not be seen as a purely defensive principle to be raised against procedural inequality. Equal protection in the full sense of the word means looking at the reality of people's lives and ensuring that everyone is accorded the basic elements of equal dignity. The law and the constitution cannot require that we all be equally happy or even equally rich<sup>38</sup>. The function of the constitution is restricted to seeing to it that as far as possible, we all have equal chance to become these things. Properly construed, equal protection signifies that every Namibian is as far as possible given equal chance to get ahead in life.

In Namibia this means the utilisation of certain mechanisms such as affirmative action to ensure that it becomes a reality that indigenous Namibian has special access to employment as a means of redressing the existent imbalances in the labour force where they are not adequately represented. Thus, all in all as soon as it is realised that affirmative action is an extension rather than a contradiction of the principle of equal protection or alternatively non-discrimination the better.

### **3.3 APPLICATION OF ECONOMIC AND SOCIAL RIGHTS BASED ON NEED**

One approach which is of relevance in seeing to it that equality is restored is simply to implement, without discrimination the economic, social and cultural rights of the indigenous Namibians.

In the past the above mentioned rights were blocked by the deliberate intention to block non-whites from access to higher and appropriate education, to jobs and to land and as a consequence, social position is closely related to race. Social position is related to race because due to the dire position that indigenous were subjected to in terms of employment; they were by implication of the lower social group. Thus, in view of the need of creating equality in a deeply unequal society, affirmative action is one way that this can be achieved.

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38 Ibid

This can be based on objective measurements of need, irrespective of racial, ethnic or other group identity<sup>39</sup>.

However, the current position in our Namibian society is that it is mainly the indigenous that have suffered as a result of the apartheid policies and laws that excluded them from being able to access employment and so this justifies the affirmative action policies' objective and the existence thereof in spite of the positive discrimination that may be involved therein. Via such an approach the base resources are profoundly unevenly distributed, they can be re-distributed. While this may have positive functions, it can also lead to disruptions in the economic life<sup>40</sup>. Disruptions can come about due to the discontent that the non-beneficiaries are subjected and they resort to retaliation via strikes and demonstrations.

The case of Zimbabwe is a good case in point, where the application of the economic and social rights of indigenous Zimbabweans were implemented in such a way that there were no constraints in place to see to it that the economy did not suffer as a result. The Zimbabweans implemented their affirmative action by grabbing land from the white people who owned land that Mugabe felt rightfully belonged to the indigenous Zimbabweans. This he implemented with no restraints whatsoever, with the result that the whites had their rights to property infringed upon without a justifiable reason. We may learn from this experience by ensuring that there are checks in place during the implementation of affirmative action measures so that it not done haphazardly.

However in Namibia, there are checks in place that ensure that this will not anytime in future ensue. For instance whilst the law as contained in article 23(2) of the constitution encourages the existence of affirmative laws, article 10 requires that all persons are to be equal and as such when the objectives of affirmative action are attained there will remain no more justification for their existence as the desired reconstruction of the labour force to ensure that all Namibians are represented would have been met. But at this point there is still a dire need for affirmative action to operate. Furthermore, article 25 makes provision for an aggrieved person to be able to approach a court of law. This allows any non-beneficiary that has suffered infringement of his right to employment in a manner so blatant that it can not be

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39 Eide (note 18 above) 8

40 M Garner 'The structure and operation of an affirmative action programme: An Outline of choices and problems'



said to be justified by the law, to approach a court of law. This and other checks justifying the need for the existence of affirmative action will be discussed later in the body of the paper.

All in all in pursuance of the above-mentioned ground this will have the impact of making it possible that those that did not have an equal starting base for participation in the economic and social life of the society will be able to proceed like wise and be a part and parcel of Namibian economic growth.<sup>41</sup>

Thus, Adams correctly contended that equal protection through the protection of social and economic rights requires the furnishing of at least the basic minimal of a decent and dignified life for all on an equal basis. Society is under duty to see to it that all its members enjoys at least the foundations of a dignified existence.<sup>42</sup> This translates into the need to see to it that those persons that were denied the opportunity to have access to employment and thus a more dignified existence are now awarded this opportunity.

### **3.4 AFFIRMATIVE ACTION IN THE NARROW SENSE**

‘Affirmative action’ is defined by section 17 of the Affirmative Action Act as:

‘...measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment are equitably represented in the workforce of a relevant employer.’

As previously stated affirmative action is an explicit effort to overcome the effects of discrimination by improving the competitive chances of those previously disadvantaged.<sup>43</sup> In other words, affirmative action is an instrument intended to address the social imbalances existing within society given the historical background of racial discrimination and dispossessions. Hence the government has formulated an affirmative action policy, which

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41 Galanter (note 29 above) 9.

42 Encarta ®World English Dictionary©&p 1998-2005

43 One can as well define affirmative action as preferential access to social resources for persons who are members of groups, which have been previously disadvantaged by adverse discrimination. (Michel Rosenfield, 1991:31)

employers in Namibia are expected to follow. This requirement is that indigenous Namibian be given preferential treatment as regards employment opportunities as a means of achieving a much needed balance.

Preference is given to the members of the non white group and is held to be justified exactly because members of the said group have been in the past been discriminated against, not because of their individual characteristics, but because they belonged to the group concerned. The process thus requires the securing of adequate advancement of such groups or individual members in order to ensure equal enjoyment of human rights and fundamental freedoms. Due to this element of preference affirmative action is sometimes referred to as 'reverse discrimination.'

But affirmative action can only be used for this purpose and not any other i.e. to secure adequate advancement of the said groups. Affirmative action is therefore intended to create equality. It can therefore be said to be an extension of the principle of non discrimination. At the same time it is aimed at accelerating the creation of a balanced society-a society where there is equality in participation at all levels<sup>44</sup>.

It must be emphasised that the norms of non-discrimination in the present distributions are insufficient to erase or dislodge the cumulative effects of past discrimination. Affirmative action as means of ensuring to it that all those subject to discriminatory law that made them unable to access employment are not subject to a position where the residues of discrimination emanating from the past are now dislodged and structural arrangements are in place to overcome those effects of past selections in which white were the driving force in almost all sectors of the economy<sup>45</sup>. This further justifies the existence of affirmative law and policies.

On the other hand, affirmative action may be advocated not as a device to assure fairness of individuals, but as a means to produce desired social outcomes for example to reduce group disparities, afford representation and encourage the development of talent and so forth.

### **3.5 CRITERIA INHERENT IN AFFIRMATIVE ACTION**

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44 Supra

45 Galanter (note 29 above) 17

As a means of ascertaining the extent to which affirmative action can be said to be justifiable regard will have to be had to criteria used in the application. This is to ensure that the desired objectives are met based on an objective standard. There is a standard for judging the discrimination against the previously advantaged through an accepted standard used in making a decision or judgement. These criteria have already been discussed but it is necessary to lay them down as means of classifying them independent from the arguments for and against them as set down earlier in the body of this paper. The seven criteria<sup>46</sup> that govern the application of affirmative action that assist in justifying the existence of affirmative action include:

- Responsibility
- Equitability
- Proportionality
- Inclusiveness
- Security
- Accountability
- Flexibility
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### **3.6 RESPONSIBILITY**

Given the attitude of the Namibian State during the colonial times of putting in place laws that discriminated against certain persons particularly the non-white's ability to gain access to employment, it should not be necessary to prove the need to remove discrimination on a case by case and sector by sector basis. Thus the state acted with deliberate speed in seeing to it that order was restored. As such the ordinary process of recruitment, training and promotion will clearly be inadequate to rectify the towering imbalances in the state's structures that are existent even today.

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<sup>46</sup> This were outlined by Charl Adams 1993: 126 but as such can be inferred from Namibia's legal stipulations.

Thus affirmative action is seems to be a tool meant to repair the damage brought on by apartheid. This duty can only be implemented by the state which has put in place laws and practices for this very purpose. Whether or not the objectives have been met will be discussed later when the results of affirmative action are brought to light. It suffices to see at this stage that if the effect of the exercise is to acknowledge the worth and liberate the capacities of all Namibians there can be no doubt that affirmative action must be used to support the just claims of the indigenous Namibians.<sup>47</sup>

### **3.7 EQUITABILITY**

According to Adams<sup>48</sup>, it is possible to promote equitable objectives with inequitable procedure:

‘The notion of equity is central to the whole enterprise of affirmative action. The basic idea is not the re-division of duties that go with office. Nor is it a paternalistic handout made to appease consciousness on the one side and buy out peace on the other. It is a project based on a sense of elementary justice that seeks to deal with and overcome inequities in an equitable manner.’<sup>49</sup>

This means that both the foundation of the programs and the way in which they are handled must be equitable. Whereas the notion of strict rights always involves total triumph for one claimant and total defeat for another, the concept of equity requires a balancing out of claims. This is in the sense that you either have a right or you do not. In the case of affirmative action this means that the interest of the current incumbents or titleholder must also be taken into account as well as of other persons from the privileged group who wish to get employment, advance up the ladder, farm or build a house.

### **3.8 INCLUSIVENESS**

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47 C Adams (1993) 127.

48 Adams (note 36 above) 129

49 Ibid

The process and considerations involved in the granting of employment have to be 'Namibianized'. The basis of doing this is to acknowledge the common claim to basic rights that exists even today. The reality is that once this is done it will be possible or practical to implement the affirmative action laws and policies.

### **3.9 SECURITY**

Affirmative action is a serious business and must be treated seriously. The criteria applying are clearly set out so that all concerned know them. There is secure link of principles and procedure governing its process. Put in other words, affirmative action should not be an excuse for dishing out rewards or should be a means of revenge or animosity<sup>50</sup>. On the other hand it should not be used arbitrarily. The rule of law must apply not the subjective, nepotistic intentions of individuals. At the same time it must be effective and the law should supervise them and see to it that they work.

### **4 ACCOUNTABILITY**

Openness and free flow of relevant information are key ingredients of the principle of accountability. Without reliable facts and figures the participants involved in implementation and elaborating can not function properly. Similarly without solid information freely supplied those entrusted with monitoring progress can not do their jobs properly.

There will also have to be accountability to the courts. In Namibia, the courts have played a role in testing the constitutionality in testing affirmative action as well as designing such programs and monitoring their implementation. In such cases they appoint commissioners to help with fact gathering and receive information from all side and make a binding determination<sup>51</sup>.

#### **4.1 PROPORTIONALITY**

Is a controlling mechanism based on reason and good sense which has the objective of creating means and ends laid down in the bill of rights and legislation. The question is, are the means used proportionate to the objectives? The test of a reasonable man is used in the courts to arrive at decisions. Parliament should also employ this test in making laws so that

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50 Galanter 'affirmative action in a new South Africa' (1992) 15

51 Supra.

sensible, just and efficacious jurisprudence based on the principle of proportionality<sup>52</sup>. By proportionality, this entails that the application of affirmative action laws and policies should be done in view of the set objectives so that the ensuing limitations are comparable (in terms of the effects) to the stipulated objectives. In other words, not too much weight should be placed on both the objectives of affirmative action and the rights of the non- beneficiaries so that that there both the rights of the beneficiaries and the non-beneficiaries are balanced. Thus an affirmative action program that debar white is not tilted towards the aim of correcting imbalances. It can be disproportionate to have criteria for appointment that is so restrictive to exclude the appointment of qualified persons. At the same time the need for qualification that is so lax that dilutes the element of qualification is also disproportionate<sup>53</sup>.

#### **4.2 FLEXIBILITY**

Flexibility of purpose is the foundation of flexibility of means. There can be flexibility in relation to the objective of overcoming the effects of past discrimination. Apartheid is bad and offensive. There must be no wavering in getting rid of its effects.

Once the firmness of the goal is accepted, it is possible to be flexible in terms of how to achieve it. The objective of flexibility must be secure affirmative action and not undermine it. It is not affirmative action but our unfortunate history that has created the issue.

Everyone knows what the basic problems are. Persons where cruelly excluded from access to employment are now claiming their rights. Others who are privileged positions are anxious that in losing their monopoly they can lose everything. The fact is that affirmative action is structured and is law-governed and principled process. And as such much of the criticism against affirmative action in the face of this loses much of its credibility.

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52 Galanter(note 42 above) 19

53 Supra

## CHAPTER 4

### 4.1 OVERVIEW

With respect to the evaluation of the costs and benefits of affirmative action policies that will be explained, to elaborate to what extent affirmative action can be said to be justifiable, this involves a two stage enquiry. The first one relates to what may be termed the problem of performance. In other words do the criteria inherent in affirmative action law and policies actually deliver the objectives for which they are purposed?

Once it is satisfactory that the laws have the projected effect it becomes necessary to establish the actual achievement. In other words this chapter will also set down whether the laws and practices flowing there-from have produced the results that they are supposed to achieve- do more jobs for the stated beneficiaries meant to benefit from the practice actually been availed. In other words, do more jobs for the beneficiaries produce considerate treatment by the officials or stimulate educational accomplishment or produce social integration.

To what extent does the delivering of the jobs entail the weight of costs alleged by the critics of affirmative action- such as stigmatizing the beneficiaries, fomenting group resentments?

What follows is a brief outline of the costs-benefits analysis of affirmative action followed by a somewhat detailed explanation of the goals and results of affirmative action. What will now be discussed is not a list of the direct effect of affirmative action e.g. more jobs, higher literacy or the like but it is a checklist for assessing achievement, it is a list of the good and bad effects that are alleged to flow from the performance promised by the program including the effects attributable to specifically preferential aspects of the objective of affirmative action

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54 Evjue-Bascom 'Evaluating the costs and benefits of affirmative action policies, papers and reports on a conference on affirmative action' (1992) 20

The lists aids as a utility of the list to remind us of the range of claims and counter claims about the effects of affirmative action measures and to suggest the complexity of any definitive assessment. It is not implied that all of them are involved in every specific scheme nor is it implied that they are to be accorded equal weight in making such evaluations.

#### **4.2 ALLEGED COSTS AND BENEFITS OF THE POLICY OF AFFIRMATIVE ACTION**

One of the averred benefits of the application of affirmative action policies and laws is the contention that it aids in redistribution. This means affirmative action provides a direct flow of valuable resources to the beneficiaries in larger measure than they would have otherwise enjoyed. However, one variable that works against this contention is that this may also lead to diversion in the sense that the said resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole. This detracts from the justifiability of the laws of affirmative action as it shows that the laws do not have any significant or practical effect in society today in view of the goals and objectives that affirmative action policies seeks to uphold.

Another facet of the alleged and costs-benefits analysis of affirmative action as a means of ensuring that indigenous Namibians have access to employment opportunities is that of representation versus misrepresentation. Through the process of representation affirmative action provides for participation in decision making by those who effectively represent the interests of the beneficiaries, interests that would otherwise be under represented or neglected. However this also brings about misrepresentation in that by creating new special interests that divert from those of the beneficiaries, affirmative action obstructs accurate representation of their interests.

Yet another aspect that can be deduced as a result of the application of affirmative laws and policies is that of integration versus alienation. Article one of the constitution provides that the Republic of Namibia is founded on the principles of democracy, the rule of law and justice for all. In a sense this prompts the Namibian people to live in a unified manner to see to it that justice for all ensues.

One way is through integration that comes as a result of the application of the laws of affirmative action which by affording the opportunity for participation and well being affirmative action programs promotes feelings of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups in to the nation society. But regard has to be had to the fact that this also prompts alienation in that by



emphasising the separateness of these groups, affirmative action reduces their opportunities for common participation<sup>55</sup>.

Yet another facet entwined in the evaluation of the cost and benefits of affirmative action is that of acceptance versus rejection. Via acceptance, affirmative action induces in others awareness that the beneficiary groups are participants in the national life whose interests and views have to be taken into account and adjusted to<sup>56</sup>. This is necessary if the principle of democracy which Namibia claims to uphold will be seen in the day to day running of the economy. On the other hand, there is also a possibility of rejection in that preferences frustrate others by what they consider unfair favouritism and educate them to regard the beneficiaries as separate, with their own facilities and having no claim on general public facilities. The element of unfairness in fact goes against the postulates of the law that require that discrimination be done away with.<sup>57</sup>

Regard has to had to the argument of integrity versus manipulation which may be used to explain the 'jusfiability' of affirmative action in that through the application of affirmative action integrity is encouraged, affirmative action permits forms of action that promote pride, self-respect, a sense of achievement and personal efficacy that enable the beneficiaries to contribute to national development as willing partners.

This is in line with the duty of the state to promote the well being of its people in a way that their lives will be better be able to be functional. This is deduced from article 95 which states that:

'The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at ... sound labour relations and fair employment practices.'

Moreover by broadening opportunities affirmative action stimulated the acquisition of skills and resources needed to compete successfully in open competition. At the same time

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55 Bascom (note 40 above) 21

56 Bascom (note 40 above) 21.

57 This is embodied in article 10 of the Constitution of Namibia that requires that everyone be equal before the law and no person s be discriminated against on grounds of race, colour or ethnic origin.

however, through the stringent upholding of incubation, affirmative action provides artificial protection, which blunts the development of the skills and resources needed to succeed without them through the attitude of over-protection.

However one benefit that arises from the application of affirmative action policies is that it brings about mobilisation though at the same time this encourages enervation. By cultivating talents, providing opportunities and incentives and promoting their awareness and self-consciousness, affirmative action enhances the capacity of the beneficiary groups to undertake organised collective action<sup>58</sup>.

A survey was conducted which revealed that there were a number of blacks with technical skills that had not been recognised by the labour system. The need to redress such equally-held assumptions in Namibia as well as ensuring the development of a human resource which can respond to the new objective of Namibia is not only a must but a matter of urgency. On the other hand, by making them dependent, blunting the development of talent, undermining self respect, affirmative action lessens the capacity for organised effort in their own behalf. This also to say that this will have the effect of impinging on the state's duty to promote the livelihood of its people in terms of article 95 of the Constitution of Namibia.

Though it is undeniable that the implementation of affirmative action laws and policies brings about discrimination that operates against the non-beneficiaries, this discrimination is classified as positive in view of the need to redress past imbalances. Moreover, the benefits of affirmative action are mutually reinforcing and will eventually render unnecessary, any special treatment once the objectives thereof are attained.

However, these arrangements create vested interests in their continuation, while discouraging the development of skills, resources and attitudes that would enable the beneficiaries to prosper without special treatment.<sup>59</sup> As such as mentioned there is an element of fairness versus unfairness. It can only be said to be fair that affirmative action compensates for and helps to offset the accumulated disablements resulting from past

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58 Bascom (note 40 above) 21

59 Bascom (note 40 above) 21

deprivation of advantages and opportunities. But whilst doing this affirmative action places an unfair handicap on individual who are deprived of opportunities they deserve on merit<sup>60</sup>.

One major benefit of affirmative action in employment is that it contributes to national development by providing incentive, opportunity and resources to utilise neglected talent. This is especially, in view of the fact that in Namibia, opportunities to put their educational knowledge and skills to productive use have been limited by the implementation of discriminatory laws and job reservation practices. But it may also lead to stagnation in that it impedes development by misallocation of resources, lowering the morale and incentive and waste of talent.<sup>61</sup>

It is as a matter of course imperative that any assessment of affirmative action programmes be placed in Namibian context. Since South African law is related to that of Namibia in terms of history and application regard can be had to the South African case of In re: Certification of the Constitution of the Republic of South Africa<sup>62</sup>, the Supreme Court identified the following as one of the basic structures and premises of then new constitutional text:

*'a legal systems that ensures equality of all persons before the law which includes laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on the ground s of race, colour or creed*<sup>63</sup>.'

Because of the commitment to substantive or equal opportunity, the draftspersons clearly intended the affirmative action programmes to be seen as essential and integral to attaining equality and not to be viewed as a limitation or exception to the right to equality. As affirmative action is part of the right to equality, it would appear that persons who challenge

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60 (Ibid) 21

61 Bascom (note 40 above) 22.

62 1996 10 BLCR 1254

63 Peggy Maisel and Lesley Greenbaum, Foundations of South African law: Critical issues for law students, 2002, Butterworths

the legitimacy of such programmes bear the onus of proving the illegitimacy thereof. Affirmative action is expressly sanctioned by the constitution, this has the effect of detracting from any argument against the application of affirmative action policies and also as to whether preferential treatment for disadvantaged persons is permitted or not.<sup>64</sup>

In view of the positive discrimination involved in the application of affirmative action policies and to what extent they can be said to be unfair regard can be had to the case of Motala and Another v University of Natal<sup>65</sup>. In this case, Hurt J adopted a highly differential standard in reviewing the admission policies of the University of Natal Medical School. A gifted Indian student that had acquired five distinctions and a B symbol in the matriculation examination was refused admission into the medical school. The medical school had decided to limit to 40 the number of Indian students admitted to its programme.

The poor standards of education available to African students under the control of the Department of Education and training meant that a merit based entrance programme would result in few African students being accepted. It was argued that as the Indian community was also disadvantaged by apartheid, discrimination between African students and Indian students amounted to unfair discrimination. The judge held that:

*'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 greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for the discrepancy runs counter to the provisions of the constitution.'*<sup>66</sup>

The apartheid system had a distinct hierarchy of races. Whites were at the top and Africans firmly rooted at the bottom. The colored and Indian communities were situated in between. It is thus, perfectly legitimate that if we are seeking to achieve genuine legitimacy, to apply the affirmative action programme in proportion to the measure of disadvantage suffered under

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64 Smith "Affirmative Action under the New Constitution" 1995 (2) SAJHR 84 at 86

65 1995 (3) BCLR 374.

66 Motala and Another v University of Natal 1995 (3) BCLR

apartheid. However when the effect of the programme is to disadvantage people who had also been disadvantaged in the past, the court must be satisfied that the programme is fair.<sup>67</sup>

In contrast, in contrast to the differential approach adopted in the Motala decision, Swart J in Public Servants Association of South Africa v Minister of Justice and others,<sup>68</sup> covertly adopted the strict scrutiny standard that is used in the USA. The South African department of Justice, prior to the democratic dispensation, was virtually the exclusive domain of white males. In order to address the situation, the department of justice appeared to adopt the position that no white males would be considered for certain posts. In setting aside this scheme, the judge regarded affirmative action for certain posts. In setting aside this scheme, the judge regarded affirmative action programmes in terms of the interim constitution, as an exception to the right to be treated equally and subjected the words of the constitution to exacting scrutiny. The court held that:

1. The affirmative action measure must be designed to achieve the adequate advancement between the designed measures and the objectives.
2. The affirmative action measure cannot go beyond what is adequate in order to attain the objective of advancement and cannot be haphazard and random. In other words the means used must be equal in magnitude or extent to the objective.
3. Both the ends envisaged and the means used are reviewable.
4. In deciding on the appropriateness of the measure, cognizance must be taken of the interests of the target group, the rights of others and the interests of the community. Regard must also be had to possible disadvantages that the target group and other groups may suffer.
5. The word 'promote' suggests an incremental and not an immediate attainment of the objective. On the facts, the court held that the affirmative action policy of only appointing women and people clinic to certain posts was haphazard, random and

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67 Supra

68 1997 (5) BCLR 577

over-hasty. As there is no carefully considered policy, it was not designed to achieve the objective and the policy was deemed unconstitutional<sup>69</sup>.

A further argument in favour of the implementation of affirmative action policies is the operation of the limitation clause. According to Currie and De Waal:<sup>70</sup>

'Limitation is a synonym for "infringement" or perhaps, justifiable infringement.' A law which limits a right infringes that right. However, the infringement will not be unconstitutional if it takes place for reasons that are recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements are unconstitutional. Where an infringement can be justified, it will be constitutionally valid'.

It is justifiable to infringe rights when the law is one of general application. This means that the limitation is authorised by a law which is of general application.<sup>71</sup>

The bill of rights lists a number of rights and then permits them to be limited in certain circumstances. This is contained in the supreme constitution of Namibia and so can be said to be of importance and relevance. The limitation clause only applies to rights that fit the criteria listed by the law. In other words the limitation clause cannot be used to justify infringements of the constitutional provisions other than those permitted by the law. This legal stipulation has a twofold function. While it permits the limitation of the rights of the non-beneficiaries of affirmative action it also acts as a check in the implementation of affirmative action measures so that no one is meant to go beyond the objectives set by the law that is to ensure that the indigenous Namibian has special access to employment opportunities. It may not be used for a non-legal purpose such as to advance the economic status of an acquaintance or for nepotistic tendencies.

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69 Maisel and Greenbaum pp 157.

70 The Bill of Rights Handbook, 4<sup>th</sup> edition, 2001 at 145.

71 Currie & De Waal (note 67 above) 147.

Most constitutions have limitation clauses. Limitation clauses may be right specific and designed to limit individual rights as is the case in the Namibian constitution or they may be of a general nature applying to all the rights. In effect, the limitation clause allows rights to be infringed if certain conditions are satisfied. It does so in order to prevent rights being used to obstruct and frustrate legitimate societal activities and endeavours. A limitation clause must therefore be carefully drafted. This is in the sense that if the requirements of the limitation clause are unduly onerous and very difficult to prove, then legitimate governmental and other action may be frustrated and the Bill of rights may become a charter for the abuse of rights. On the other hand if the provision of the limitation clause is easily satisfied, then rights can be devalued. This is so because rights can be infringed in impunity and a non-exacting limitation clause can then be relied to justify such infringements. It is thus important that they right balance be achieved<sup>72</sup>.

This contention was held in the case of Ferreira v Levin<sup>73</sup>.

The following analysis is aimed at providing a preliminary basis upon which to develop such a formulation. The first section analysed the constitutional guarantee of equality and the role of anti discriminatory measures in its achievements. The next section looked at affirmative action in action. Emulation to issues of equality and discrimination, finally regard is had to the mechanisms required to implement an affirmative action in programs.

#### **4.4 WILL ALL NAMIBIANS BE EQUAL IN NAMIBIA?**

Affirmative action is by definition a form of social organisation premised on inequality. The struggle against apartheid is a contract premised on the promise of a future Namibia in which all people enjoys equal rights and opportunities<sup>74</sup>.

Guarantees of equality in the constitution and affirmative action policies is a framework in which the government is encouraging a future in which equality but the question then arises achieve equal opportunity? Assuming the achievement equal treatment through the

72 Maisel and Greenbaum pp 157.

73 1996 (1) BCLR 1 (CC) at para 44.

74 H Klug 'Rethinking affirmative action in a non-racial democracy' SALJ 1994 10 319

guarantee of equal rights, will all Namibians be ensured equal opportunities? Even if we limit the concept of equal treatment to the right to be treated as an equal as distinct from the right to be equal distribution of resources, opportunities and burden equal opportunity remains elusive. Given the history of apartheid and colonialism it is reasonable to assume that even after the lifting of formal legal barriers socially caused inequality will continue equal opportunity. The provision of education and social and economic advantages will continue to deny equal opportunity. The provision of education, social and economic advantage to the white minority and even differentially among the oppressed communities creates a continuing inequality in the capacity of individuals to make use of opportunities or take advantage of favourable positions.

#### **4.5 WILL ANTI-DISCRIMINATION PROVISION SECURE EQUALITY?**

Both the constitution and policies aim toward eradication of discrimination. The demand the removal of formal discrimination and provide for the criminalisation of discrimination in all its forms. In addition, the advocacy of racism or the incitement of ethnic exclusiveness is criminalised. Though the criminalising of specific discrimination provides strong measures designed to discourage explicit exhibition of racial prejudice they may be subject to criticism on two grounds<sup>75</sup>.

First they will be those who argue that despite the history of apartheid, criminalisation of specific forms of speech may amount to discrimination. Secondly despite the emphasise of the need of anti-discrimination measures there is a valid argument that emphasis upon anti discrimination which implied dependant/victim dichotomy does not adequately address issues of equality, the limitation of anti discrimination measures becomes clear when an analysis of how such measures will operate and their potential effectiveness in achieving equality<sup>76</sup>.

Also in terms of individual discrimination, the problem of obtaining sufficient evidence to establish evidence to prove discrimination beyond a reasonable doubt, including the element of *mens rea* will make convictions especially in cases of subtle discrimination difficult. Plus

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75 Klug (note above) 319

76 Supra



when we add the costs in time and the resources in criminal trial, these difficulties illustrate the difficulty in relying on criminal sanction alone.

Though in cases of civil cases, the burden of proof-the balance of probabilities is less than in criminal cases, the cost to individual in terms of finances if the loss makes them liable to both their own and the other parties fees will deter victims of discrimination reluctant to sue<sup>77</sup>.

#### **4.6 WHY IS EQUAL TREATMENT NOT AN ADEQUATE RESPONSE?**

Formal equality as legally provided in the law with its requirement of equal treatment would be sufficient if all citizens were identical-similar in all respects except that they are distinct individuals. However, given that individual differ in their preferences, values and economic positions; it is necessary to recognise that the definition of equality is premised on a selection of relevant criteria<sup>78</sup>. Thus, my contention is that given the different facets of what equality entails and the criteria needed to bring it about that are very broad in nature, this makes the implementation of affirmative action problematic in that in most instances than not, we will fall short of meeting the very objectives that affirmative action seeks to attain. For instance, the implementation may be hindered by aspects other than the fact that the policies that uphold affirmative action are not properly implemented, such as the mindsets of some poverty-stricken who have reconciled themselves to their status quo and are not inclined to avail themselves to legally available opportunities to better their lives via employment. In this case, affirmative action laws and policies will be futile in their intended goal because the real issue (i.e. people's mindsets) is not directly addressed in the implementation of affirmative action.

In addressing issues of normative equality, Plato and Aristotle distinguished between numerical equality in which each individual receives an identical amount and proportional equality which requires that all will receive the same consideration in the distribution decision though the numerical amounts of distribution differ. Principle of numerical equality recognises that human beings are diverse and unequal in most respects but holds that for the purpose of distributing benefits among members of society such differences are irrelevant.

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77 Klug (note 32 above) 320

78 Klug (note 32 above) 321

With respect to the position today, my view is that proportional equality requires equal opportunity but holds the differences among people may require numerically different treatment<sup>79</sup>. Two forms of relative inequality may be distinguished, merit and need. Making merit the criterion for determining the allocation of burdens and benefits implies the measurement of value of the individuals to society. Distribution according to need recognises that people are different in that a host of respects affecting their ability to contribute to society exists but denies the relevance of most of these differences as criteria to be used for the distribution of society's benefits<sup>80</sup>. Adopting criteria based on need involves evaluating the consequences of proposed distribution in terms of their effectiveness in meeting the needs of recipients. Recognising the deterministic significance of the needs of recipients allows us to focus beyond individual differences and onto social causes underlying existing inequality, which demonstrate that unequal needs today are to a large extent the result of unequal treatment in the past.

Many studies have found that people prefer merit-based decisions (solely on merit) to any type of preferential treatment, neither weak nor strong. Strong preferential treatment could even go as far hiring an unqualified affirmative action beneficiary rather than a clearly qualified non-beneficiary. In view of the legal framework in place, this would assist in bringing about a position whereby the objectives of affirmative action are met.

The harmful effects of affirmative action includes that it stigmatises its own beneficiaries. It implies that they can not compete on an equal basis. Interestingly this hangs over the heads of those who have made it on the merits and not just those who have made it on the basis of affirmative action handouts. Although hiring programs on the basis of affirmative action aim to remedy the ills of past discriminatory practices some evidence indicate that they harm the very people who are supposed to benefit<sup>81</sup>.

The case may be that various arguments may be advanced against the applicability of affirmative action but there are valid legal arguments that run counter to the ones stated

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79 M O'Dowd 'The Grown imperative, Jonathan Ball publisher, Johannesburg (1991) 264

80 Klug (note 32 above) 322

81 H Klug 'Rethinking affirmative action in a non-racial democracy' SALJ 1994 10 319

above. According to Dupper<sup>82</sup>, one argument is that every member of the deprived groups has in fact suffered from the effects of past discrimination and similarly every member of a non-deprived group has benefited (at least indirectly) from the effects of past discriminations. In my humble opinion, the non-deprived groups have benefitted in that they are born into families where because of the wealth brought about by the job security of their parents, face little or no challenges at all in availing themselves to the most efficient educational facilities and consequently jobs and in this way have been able to 'milk' from the colonial dispensation of olden days.

One of the proponents against this argument is Judis Thompson who addresses the familiar objection that affirmative action often targets individuals from groups that have been discriminated against in the past but who may not themselves have been wrong, and places the burden on current members of the community to repair their wrong even though many of them may have played no part in causing the wrong.<sup>83</sup>

For example a black person for a job might belong to the middle class, is the son or daughter of a well educated professional and as a consequence may have been given the best education, yet or she may still be preferred over a white applicant who has himself in any degree never been discriminated against like the black people. This according to critics is unjust. Thomson says that these arguments are wrong for a number of reasons. She notes that it is true that the situation for the black people had improved but this does not change the fact that wrongs are still committed against these groups<sup>84</sup>. Large scale, blatant forms of mistreatment may have disappeared in Namibia but disparaging wrongs still exist according to statistics.

And they have not been given equal share of the benefits the others in the community enjoy. And even those that have not been the actual victims of past discrimination may have suffered lack of confidence. Thomson differentiates between those who have unjustly deprived of benefits and those that have not been directly deprived of benefits but who have been made to suffer the consequences of injustice to other blacks by virtue of their membership of

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82 O Dupper 'In defence of affirmative action in South Africa' SALJ 2004 187 189

83 Thomson 'Preferential hiring' (1973) 2 Philosophy and public affairs 364.

84 Dupper (note 33 above)

these groups<sup>85</sup>. Thomson acknowledges that the implementation of affirmative action policies will inevitably impose costs.

In the example, white applicant who are passed over for a non qualified a black person, this problem is not grave for it can be argued that though the majority of white male are not the cause they are still the beneficiaries of policies that excluded black persons for instance with respect to education and opportunities to pursue higher-learning<sup>86</sup>. And even those who did not directly benefit in this way, they may have as Thomson points the advantage in competition which comes of confidence in ones full membership that is a sense of entitlement to jobs simply by being white.

Furthermore, in Namibia this argument carries a particular question that is whether it is fair to place the burden on the white community to ensure redress to the overwhelming majority<sup>87</sup>. This inevitably raises concerns about the appropriateness of affirmative action as a means of carrying out compensation of the kind under discussion. If that is the object one could argue that there other means of compensation for example cash payment which could have the advantage of spreading the costs more fairly be ensuring that they are shred by everyone and not imposed entirely on the white community. This is indeed a serious challenge. Thomson contended

'If there was some appropriate way in which the community could make amends to the blacks which did not require depriving anyone of anything that he has the right to then that would be the best course of action to take or if there were in any way that the cost could be shared and not imposed entirely on the white applicant that would be better than adopting a policy of preferential hiring'.

Thomson, further dismisses the idea of monetary compensation by arguing that jobs are the most appropriate way of ensuring that black people feel that they have achieved full membership in the community. Financial compensation slips through the fingers unlike having a job.

The second question that must be addressed is that if a practice of special treatment of blacks is justified why other victims of injustice shouldn't also receive special treatment. To illustrate, a black person may be preferred over a white who may be experiencing hardship

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85 Dupper (note 33above) 195.

86 Dupper at 196.

87 Ibid (note 33 above) 198.

why should he then not experience equal treatment.<sup>88</sup> In other words, if the reason for giving special treatment is that they have suffered an injustice, special treatment must also be given to a person that has been injured similarly.

This argument in effect shifts the attention from compensation of individuals to collective compensation of groups which brings us another argument that justifies affirmative action. Before mention is made of the next argument, it can be said that the above mentioned argument in effect entails that the affirmative action is indeed at least in essence the only way forward if the past injustices of the past whereby the indigenous was denied access to employment was the prevailing practice can be reversed.<sup>89</sup> I agree with this position in that the only way that equality that is substantive and whose effect will be felt on the ground is if past injustices are redressed through the implementation of affirmative action laws and policies.

Another argument is that those to be compensated are not individual victims at all but are the groups in which they belong. This is the argument those who reject affirmative action as compensation centres on the question whether such a policy should be seen as compensating individuals. Such a policy should be seen as benefiting individuals qua individual of a black group. The argument that every person has personally suffered disadvantage is difficult to sustain. Instead of assuming that task some defendants seek an explanation as to who the beneficiaries really<sup>90</sup>. This policy is meant to benefit previously disadvantages as members of a group and not individuals.

To give an illustration when a black man is promoted on the basis of affirmative action we should see him primarily as a representative member of a certain group. Note that there is a virtue to this argument in that it shows why preferential treatment should be extended even to those current group members who may not themselves have been the original victims of discrimination. The argument however raises the question of selection of the groups that are the objects of affirmative action.

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88 supra

89Dupper (see note 33 above) 200

90 Dupper at 201.

In terms of the Namibian context, the constitution states that the benefits of affirmative action may be those disadvantaged by unfair discrimination. This means that to be a beneficiary two requirements, he or she must be from a designated group and must be qualified. In the United States, some critics of affirmative action have characterised as arbitrary the said selection. Briefly stated their argument is that if there are other groups discriminated against such as gays and lesbians, native Americans, why should they not be able to lay claim in the same way that the beneficiaries of affirmative action do? This in my opinion entails that the policy of affirmative action and its justifiability is negated by the fact that the policy of affirmative action has chosen to apply to only sectors of society i.e. the disadvantaged indigenous person whilst other sectors of society that are discriminated against such as gays, have no affirmative action policy available to them.

The accusation of arbitrariness is a weak argument is weak because what sets racial discrimination in Namibia and arguably the US apart from other forms of discrimination is in my view institutionally based. Racial discrimination permeated the society and has a devastating effect on the social and economic position of these groups. Another concern that the affirmative laws and policies raise is that even if one grants that certain groups are owed collective compensation, it does not follow that affirmative action policies are adequate instruments for compensating groups<sup>91</sup>. In fact the link between collective compensation to groups and to individual members is highly problematic. How can it be that preferential award of a job or position to a chosen individual could benefit the others who are not directly affected by the measure in question?

This difficulty is rendered even more pronounced by the fact that affirmative action policies often award compensation to a select group, namely those who have qualifications to be considered qualified for the jobs available. The criteria in place may run counter to the objectives in that even though the definition of designated group is brought, this limits the number who will benefit and goes against the goal of attaining equitable representation in all occupational categories and levels of the workforce<sup>92</sup>. Moreover the unskilled and the lower skilled persons who form the majority in these designated groups are excluded through the

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91 Dupper (note 32 above) 201

92 NEPRU 'Can Namibia do better? Policies to improve economic performance, Reducing poverty and inequality in Namibia, 1999.

operation of these criteria. This criticism raises doubt about the claim that affirmative action policies are acceptable. This reveals that the argument if not completely flawed is incomplete. By incomplete this is my view relates to the fact that the criteria in place may in certain instances run counter to the very objectives of affirmative action. This is in the sense that they focus on availing jobs to those that have qualifications whereas the real and predominant issue is that due to the colonial legacy most Namibians lack the required education to be considered for the jobs that avail themselves. Hence I strongly contend that the laws and policies of affirmative action should address the matter of unemployment at a much lower level by ensuring that the indigenous person is given preference even as regards the right to education. This can be done by setting up measures that will ensure that a black child will as far as is possible and practical be helped to secure a place in school even when this mean that in certain instances it will mean that a white child will be denied this opportunity. This is the only way that affirmative action will reap 'real and fruits.' As such as it is today, it can be said to be incomplete.

Another argument is that only group members who have actually suffered from past discrimination should be given preference in terms of affirmative action. Even if one is able to make a case that benefiting a few members actually means that all members of a group are compensated a further and related argument of this has to be addressed, mainly that compensatory affirmative action policies are over-inclusive.

By focusing attention on groups rather than individuals who are not needy who in fact receive benefits at the expense of those who are handicapped and are most in need of compensation. If what we want is to compensate victims of apartheid, then critics point that the emphasis should be disadvantaged member of the designated group and not the entire group as such. This approach would be in accordance with the law in that only those discriminated against are able to come within the protection of the law and thus be able to seek redress<sup>93</sup>.

To ensure that this position is not abused, statistics can in my view be employed. When it becomes certain through the use of statistics that most previously-disadvantaged indigenous Namibian is now fully represented in the working force, then the need for these laws will be negated and would then have to be accordingly done away with.

As a tool of asserting the actual benefits of affirmative action in light of establishing the justifiability of affirmative action I will now bring to light the findings that reflect the implementation of affirmative action. The following is derived from assessment reports and

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93 Dupper (note 32 above) 203.

to a lesser extent the interview that were conducted during the course of this research. As regards the question of how important affirmative action is, a question was put forth to the interviewees to establish the underlying reason for affirmative action. Among the people that were interviewed 52.8% held that the importance of affirmative action was to create opportunities for the previously disadvantaged. 24.5% were of the view that affirmative action served as a means of correcting imbalances of the past. It was interesting that only 5.7% opted for the contention that affirmative action was intended to correct the various forms of discrimination and to promote equal rights. 3.8% were of the opinion that affirmative action with respect to access to employment of indigenous Namibian was required to improve the conditions of those previously disadvantaged at work. Unfortunately 3.8% responded that they have no idea as to why a policy such as that of affirmative action was existent. Most women respondents in support of their gender emphasised that in view of the current position, a policy such as that of affirmative action was needed to promote women to management positions.<sup>94</sup>

The above stated finding shows that affirmative action does have a vital role to play in our Namibian society. Moreover, in view of the fact that the law should seek to uphold the interest of society and opt for mechanisms that ensure its betterment as succinctly stated in article 95 of the Constitution of Namibia, affirmative action can not be discarded and is therefore justifiable at least to a large extent. On the issue of who should benefit from affirmative action, managers indicated that these should be people in 'designated groups' as identified in the Act (46.9%). Others (18.4%) were of the view that the whole country should benefit from affirmative action policies and 10.2% said that all employees should benefit.

A manager at a financial institution pointed to the issue of who should be covered under the designated groups. He said that:

*'at the moment we employ many coloured people and very few black and white people. In terms of statistics this looks fine as brown people fall under the designated group, but in terms of fairness and getting the right profile and aligning that profile with the profile of the population of the country, we still have to overcome the milestones to employ more black people...if you want to cater for the general population in Namibia, you need to have a representative workforce'.*

Hence, in view of the still existent discrepancies, it is only justifiable that a policy such as affirmative action continue to exist in spite of its shortcomings as it is one of the most feasible ways that the said discrepancies can be redressed. The manager also pointed out

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94 Namibia's affirmative action in employment, an assessment 2000-2004, Employment Equity commission (2005) 57



that affirmative action does not only benefit the designated groups as the legal stipulations indicate but also the historically advantaged people:

'History has shown that if a country has many poor people, they can rise and create a revolution. The white males are not benefiting directly from affirmative action at the moment, but indirectly they do because it makes the social circumstances much better<sup>95</sup>.'

In my view the policy needs to be adjusted further in order to categorise the different disadvantaged groups according to the level of their disadvantage because as it is employers tend to employ coloureds and may then claim to do so according to the affirmative action policies. But the fact remains that the most disadvantage both in the past and in present times are the blacks and so they should be given priority in the implementation of affirmative action measures.

According to the assessment report,<sup>96</sup> according to management's experiences, the policy of affirmative action was implemented in the form of recruitment and promotion of people from previously disadvantaged groups (21.1%); setting up and training affirmative action committees (23.2%) and improving skills of previously disadvantaged groups (15.9%). Several managers also indicated that they hired HR consultants (7.2%) while 5.8% were not sure how affirmative action was implemented in their company.

A manager at a financial institution pointed out that: 'we decided that if we could get qualified black people, we would employ them even if we had no vacancies. We started employing black people and the results were quite good. Some of them now have higher positions in the banking sector and in other organisations, which gave them good offers. We now make recruitment decisions based on the requirements of affirmative action.' Thus in view of the minimal trend of progress that can be reflected in views such as these as well as statistics, this in itself shows that affirmative action is justifiable.<sup>97</sup> All that is required to curb the aforementioned negative aspects of affirmative action is that it be kept in check so that it does not amount to positive discrimination that is not justifiable.

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95 Supra

96 Namibia's affirmative action in employment (Note 34 above) 66.

97 Supra



## CHAPTER 5: CONCLUSION

This paper examined the laws and policies of affirmative action that has the objective of ensuring that the indigenous Namibians are given first option when employment opportunities avail themselves. Analysis was made of the legal concepts underlying the policy and critical evaluation was undertaken.

Given the gross inequalities in the distribution of wealth and unequal access to land, education and health that characterised colonial Namibia, there was a need to transform the society into one where an equitable socio-economic structure was the *status quo*<sup>98</sup>. Affirmative action was the instrument used to redress the imbalances of the past. Article 23(2) of the Namibian constitution empowered parliament to enact legislation aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices. Critics immediately labelled affirmative action as 'reverse discrimination.' Hence the need to ascertain to what extent the said affirmative action can be said to be justifiable.

As regards the arguments for affirmative action it has been established that though on the face of it affirmative action may seem to go against the pretexts of equality in that the non-beneficiaries of affirmative action are not able to have access to employment in certain instances where preference is given to their black counterparts, this constitutes a justifiable limitation on their rights. This is in the sense that if the inequalities of the past are to be reversed by taking legislation to deal with social, economic and cultural rights. It follows that one major qualification to this is when affirmative action is required to accelerate the achievement of equality in fact. Another facet of affirmative action that warrants its existence is that it helps deal with the inherited discrimination of the past.

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<sup>98</sup> DISS Working paper 'Namibians post colonial socio-economic (non-transformation) Business as usual? 2006

It must be understood with respect to discrimination that not all distinctions or classifications constitute discrimination. Whether the distinction is arbitrary or unreasonable must be seen in the light of the right concerned, the purpose for which the distinction is made and whether the classification made had no more harmful consequences for the category of persons concerned than is necessary in order to achieve the purpose of the classification. And given the present situation where indigenous Namibians still suffer discrimination and are not adequately represented in the workforce any discrimination experienced by the non-beneficiaries of affirmative action is justifiable. Thus in view of the above-mentioned contentions, i.e. the fact that affirmative action laws are of general application, the distinction involved in treatment of beneficiaries and non-beneficiaries is not arbitrary nor unreasonable (in view of the current need); the purpose for which the distinction is made and the fact that the classification has no more harmful consequences to achieve the purpose of the classification, the affirmative action legislation passes the test of proportionality and thus is within the bounds stipulated by the limitation clause.

This approach correlates with the need to ensure that the economic and social rights of the indigenous Namibians are upheld as embodied in article 95 of the constitution. Nonetheless, if not properly monitored it may lead to disruptions in the economic life. And so it must only be used for the purpose of securing adequate advancement of such groups or their individual members in order to enjoy equal enjoyment of human rights and fundamental freedoms. In my view, affirmative action can thus also be said to be an extension of non-discrimination.

Regard must also be had to the fact that affirmative action also has a reparations theme. This is in the sense that the history of invidious treatment has given birth to accumulated disabilities which are carried by certain groups. To distribute benefits by neutral standards will perpetuate and amplify the unjust exactions and exclusions in the past. Fairness then demands that present distributions be arranged to undo and offset old biases, not to perpetuate them.

Finally an evaluation of the cost and benefits of affirmative action arising from the actual implementation of affirmative action show that there is a dire need for a policy such as affirmative action to be in operation. Affirmative action can not be said to be perfect in that it is not without shortcomings. Some being that it may lead to group resentments and lower self esteem of blacks who may wonder whether they are employed due to affirmative action instead of professional know-how. The gist of the costs and benefits has been outlined in the body of the paper so it will suffice to outline only a few. For instance while affirmative action provides a direct flow of valuable resources to the beneficiaries in larger measure than they

would otherwise enjoy, but the downside is that these resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole. Furthermore, there is a tug of war between fairness versus unfairness. This is in the sense that affirmative action compensates for and helps to offset the accumulated disablements resulting from past deprivation of advantages and opportunities. At the same time, affirmative action places an unfair handicap on individuals who are deprived of opportunities they deserve on merit.

None the less, in view of the fact that injustices of the past are still to a large extent experienced today and the need to uphold constitutional postulates that require that a restructuring should take place if all Namibians are to enjoy the full force of fundamental human rights in a way that will secure their future.

**WORD COUNT: 18,307**

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**AFFIRMATIVE ACTION WITH RESPECT TO ACCESS TO  
EMPLOYMENT FOR INDIGENOUS NAMIBIANS, IS IT  
JUSTIFIABLE? A LEGAL PERSPECTIVE**

**BY**

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**DISSERTATION**

**IN PARTIAL FULFILMENT OF THE REQUIREMENT OF THE AWARD OF THE  
DEGREE OF BACHELOR OF LAWS AT THE FACULTY OF LAW**

**UNIVERSITY OF NAMIBIA**

**NOVEMBER 2009**

**PREPARED UNDER THE SUPERVISION OF MS. Y DAUSAB**

**LECTURER PROFESSOR HINZ**