Affirmative action and non-discrimination: South African law evaluated against international law

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Abstract

This article evaluates South African law regarding the relationship between affirmative action and non-discrimination against international law. The United Nations (UN) holds that grounds of distinction introduced in the framework of an affirmative action policy should be 'relevant' to the right to equality in order to be 'non-discriminatory'. While the South African Constitution authorises affirmative action in broad terms for persons or categories of persons disadvantaged by unfair discrimination, the Employment Equity Act (EEA) focusses on race, sex and disability for beneficiaries of affirmative action. The author argues that there is a sufficient connection between these grounds and the right to equality and that the grounds are thus not contrary to the non-discrimination principle laid down by international law. The ground of citizenship as mooted by the Auf der Heyde case and recently formalised by amended regulations to the EEA, is argued to be similarly relevant in the South African context, but not in an unqualified manner.

INTRODUCTION

South Africa, as a member state of the United Nations (UN), is part of the broader international community. The Constitution of South Africa (hereafter the 'constitution') – the first Act on which this article focusses – recognises this and requires that, when interpreting the Bill of Rights, a court must consider international law. Similarly, the Employment Equity Act (EEA) – the second Act

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1 South Africa was a founding member of the UN but was excluded from the General Assembly as from 1974 owing to its apartheid practices (FA van Jaarsveld Van Van Riebeeck tot Vorster 1652-1974 (1976) at 569). It was readmitted in 1994 (Peter R Baehr & Leon Gordenker (eds) The United Nations in the 1990s (1994) at 110; Basic facts about the United Nations (1995) at 214). The country is also a member of one of the UN's specialised agencies, the International Labour Organisation (ILO). South Africa had to withdraw from the ILO in 1964 owing to its apartheid policies (International Labour Conference 79th session (1992) Special Report of the Director-General on the Application of the Declaration concerning Action against Apartheid in South Africa ILO at 101) but rejoined in 1999.
20 of 1996.
3Section 39(1)(b) of the constitution.
4Section 55 of 1998.
on which the article focusses - has to be interpreted in compliance with the constitution and the country's international law obligations.\(^5\)

In this article the author investigates international law regarding the relationship between affirmative action and non-discrimination and evaluates the constitution and the EEA against the former.

**INTERNATIONAL LAW**

**Introduction**

The international community has given concrete shape to the idea that every individual has fundamental rights that must be protected by the state.\(^6\) The protection of such rights is nowadays widely recognised and has become part of the contemporary law of nations.\(^7\)

**United Nations**

**Introduction**

The UN constitutes an integral part of international politics.\(^8\) It was created in 1945 after World War II with the purpose of guiding the world into an era of peace, security and well-being.\(^9\)

The UN Charter\(^10\) (hereafter the 'charter') codified the major principles of international relations - from the sovereign equality of states to the basic human rights to which every individual is entitled. It requires a pledge from member states to promote 'respect for, and universal observance of, human rights and fundamental freedoms'\(^11\) and a commitment to take joint and separate action in cooperation with the UN to promote world peace.\(^12\) It reaffirms faith in human rights, in the dignity and the worth of humans, and in the equal rights of men and women.\(^13\)

The UN employs international machinery to solve international problems of an economic, social, cultural, or humanitarian character, and to promote and encourage\(^14\)

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\(^5\)Subsections 3(a), 3(d) of the EEA. In particular those obligations contained in the ILO Discrimination (Employment and Occupation) Convention No 111, 1958. Another article will assess South Africa's compliance with ILO standards.


\(^7\)SA Law Commission n 6 above at 5.

\(^8\)Baehr & Gordenker n 1 above at x, 10; Evelyn Kallen *Ethnicity and human rights in Canada* (1995) at 1.

\(^9\)Baehr & Gordenker n 1 above at 1.

\(^10\)Signed on 26 June 1945 (*Basic facts about the UN* n 1 above at 3). The charter established six main organs, including the Economic and Social Council, to manage the operations of the UN (Chapter III Article 7(1), Chapter X Articles 61(1) to 72). The Council initiates studies and reports with regard to international economic and social matters and coordinates the work of the specialised agencies of the UN.

\(^11\)Article 55(c) of the charter.

\(^12\)Article 56 of the charter.

\(^13\)Preamble, Chapter I Article 1(1) of the charter.

\(^14\)Chapter I Article 1(3).
... respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...  

It thus provides for formal equality by prohibiting discrimination on four specific grounds namely race, sex, language and religion. No provision was made for affirmative action at that stage.

As its main, first step of practical importance in the field of human rights, the UN adopted the Universal Declaration of Human Rights (hereafter the 'declaration'), which pledges to promote universal respect for and observance of human rights as 'fundamental freedoms'. Similar to the charter, the declaration holds that the peoples of the UN have reaffirmed their faith in fundamental human rights, in the dignity and worth of people, and in the equal rights of men and women. It proclaims the declaration as 'a common standard' of achievement for all peoples and nations, and emphasises that all human beings are 'born free and equal in dignity and rights'.

The declaration thus sets out the three main principles of human rights namely freedom, equality and dignity. It shifted some of the emphasis of international law from its concern exclusively with the state, to greater attention to the individual. In this regard, it holds certain rights to be 'inalienable' rights of all humans and makes it clear that everyone must be respected without distinction of any kind. Further grounds of non-discrimination (than those listed in the charter) were added (in a non-exhaustive manner) namely colour, political or other opinion, national or social origin, property, birth or other status.

15Formal equality holds that the law is neutral and that the state must act as a neutral force in relation to its citizens, favouring no one above another. It sees the function of the law as being limited to protecting individuals against intentional prejudice on the grounds of, for example, race and sex. Any attempt to attach rights to group membership, rather than to the individual, is bound to degenerate into a 'crude, political struggle' between groups seeking favourite status. Formal equality thus focuses on the rights of the individual as an individual (that is, the merit principle) and market freedom (see Sandra Fredman 'Equality: a new generation (2001) 30(2) Industrial Law Journal 145–155; Ockert Dupper 'Affirmative action and substantive equality: the South African experience' (2002) 14(2) SA Merc LJ 278; Marié McGregor 'The nature of affirmative action: a defence or a right?' (2003) 15(3) SA Merc LJ 423).

16Adopted on 10 December 1948.
17Preamble of the The declaration.
18Ibid.
19Article 1 of the declaration.
20Kallen n 8 above at 1.
21Baehr & Gordenker n 1 above at 101.
23Article 2 of the declaration. The ideological roots of non-discrimination can therefore be said to be international (Jane Hodges Aeberhard 'Affirmative action in employment: recent court approaches to a difficult concept' in Martha Fetherolf Loutfi (ed) Women, gender, and work what is equality and how do we get there? (2001) at 459; Sieghart n 6 above at 17).
The declaration, although not legally binding, has become the foundation for establishing legal norms for international behaviour with regard to the rights of individuals.24

**International covenants**

**Introduction**

The general principles of the declaration have been expressed in other international instruments such as the International Covenant on Economic, Social and Cultural Rights25 and the International Covenant on Civil and Political Rights.26

**Non-discrimination**

These instruments emphasise the principles of dignity and equality and contain non-discrimination clauses, generally listing grounds of non-discrimination in a non-exhaustive manner.27

Specific instruments with regard to discrimination have been adopted, such as the International Convention on the Elimination of All Forms of Racial Discrimination28 and, in later years, the Convention on the Elimination of All Forms of Discrimination against Women.29

The instruments, however, do not require that all people be treated alike in all circumstances. Instead, they hold that people are entitled to protection from man-made impositions of oppressive power which would restrict the development of their individual potential.30 Equality of treatment is required only in respect of fundamental human rights which are inherent in humanity and which are necessary to enable people's personal diversity to develop and manifest itself.31 Moreover, international instruments expressly acknowledge that rights can be limited in the interest of individuals and the broader community.32

**Affirmative action**

International instruments (except the very early ones) embrace the notion of substantive equality33 in recognising affirmative action as a duty on member states.

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24 Baehr & Gordenker n 1 above at 101; Chaskalson n 22 above at 197.
25 Adopted on 16 December 1966. This Convention deals primarily with collective societal rights which governments must provide to all people in a society.
26 Adopted in 1966. This Convention deals with individual rights which all individual citizens must be allowed to exercise.
27 See Articles 2, 3, 26 of the International Covenant on Economic, Social and Cultural Rights; Articles 2, 3 of the International Covenant on Civil and Political Rights.
28 Proclaimed by the General Assembly of the UN on 20 November 1963 and adopted in 1965.
29 Adopted in 1979.
30 Sieghart n 6 above 18.
31 Ibid.
32 The South African Constitution follows international law, in that it recognises that rights are not absolute and may be limited (s 36). See Justifying discrimination below.
33 Substantive equality, in contrast to formal equality, views the state as having a duty to act positively to correct the effects of discrimination. It rejects the idea of a neutral state and maintains that a refusal to intervene is itself a positive statement of state support for continuing societal discrimination. The notion recognises the extent to which opportunities are determined by individuals' social and historical status, including race and gender, as part...
Affirmative action and non-discrimination

For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides for ‘proactive measures’ against racism. It provides that special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedom ‘shall not be deemed racial discrimination’. It places a duty on state parties when the circumstances so warrant, [to] take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights likewise require state parties to adopt policies to implement affirmative action. The Convention on the Elimination of All Forms of Discrimination against Women authorises affirmative action measures as temporary measures aimed at accelerating de facto inequality between men and women. It explicitly states that such measures ‘shall not be considered discrimination’.

States meet their obligations in terms of the covenants in varying degrees. Generally, however, the extent of the protection envisaged in the original Charter— to protect human rights without distinction as to race, sex, language or religion— has been broadened to include disabled people, the elderly and homosexuals, and affirmative action for these groups is common.

... of a group. It recognises that discriminatory acts are part of patterns of behaviour towards groups, such as women, blacks and disabled people. It holds that as the non-discrimination principle is in itself insufficient to achieve true equality in a historically oppressed society, affirmative action measures are required to distribute social goods. Affirmative action measures therefore seek to correct imbalances where factual inequalities exist (see Janet Kentridge ‘Equality’ in Matthew Chaskalson et al Constitutional law of South Africa (looseleaf) (2002) 14–3; UNESC ‘Prevention of discrimination the concept and practice of affirmative action’ final report submitted by Mr Marc Bossuyt, special rapporteur in accordance with Sub-Commission Resolution 1998/5 17 June 2002 (hereafter ‘UNESC Final Report’) paras 35, 90; Dupper n 15 above 278–280; McGregor n 15 above 423–424).
Relationship between affirmative action and non-discrimination

The UN Economic and Social Council provides guidelines for judging distinctions made in terms of affirmative action policies. It holds that the relationship of affirmative action to the principle of non-discrimination, as the reverse formulation of discrimination, is particularly important. Non-discrimination as a legal technique to counteract unjustified inequality, is founded on the basis that no state may legitimately disadvantage any person arbitrarily. Non-discrimination and affirmative action may, however, clash with each other if not carefully framed. Whereas the non-discrimination principle removes factors such as race and sex from decision-making processes, affirmative action seeks to ensure substantive equality by taking those very same factors into account.

Also, affirmative action policies, in seeking to bring about equality, may use extreme or irrelevant distinctions to achieve their objectives in a particular situation. To avoid this, affirmative action policies must be scrutinised and controlled so as not to undermine the principle of non-discrimination itself. In this regard, international law holds that evaluating distinctions introduced in the framework of an affirmative action policy should be the same as evaluating distinctions under the non-discrimination clauses of international instruments.

In international instruments, only discrimination that is regarded as ‘arbitrary’ or ‘unjust’ is prohibited. ‘Distinctions’, in contrast, is a neutral term which is used when it has not yet been established whether a specific differential treatment may be justified or not. The term ‘differentiation’ points to difference in treatment, which is deemed to be lawful. Consequently, not all differential treatment is prohibited, but only that which results in discrimination. This raises the question as to when differential treatment becomes unacceptable (and discriminatory), or when such a distinction can be justified. Generally, discrimination is prohibited on the basis of sex, race, colour, language, religion, political or other opinion, membership of a racial minority, or birth or other status. Discrimination in this sense is seen as a failure to respect the principle of equal treatment: when two people are considered comparable, but are not treated equally, this is considered discriminatory. In practice, however, inequalities are often found as a result of systemic discrimination practised over many years in a particular society on the basis of, for example, race, sex, membership of an ethnic minority, and disability. To treat such people as being equal to those who have not been subjected to discrimination would not make sense. Therefore, to re-establish a balance in such a society, and, as part of a broader effort to eliminate all inequalities, affirmative action measures have to be implemented for such people. In other words, without intervention for a period of time, it would not be possible to attain equality for groups previously discriminated against and, consequentially, to eliminate inequality. Different treatment, in this sense, is acceptable.

Generally then, affirmative action measures are not seen as discriminatory, as the term ‘discrimination’ exclusively connotes ‘arbitrary’ or ‘illegitimate’
distinctions. However, not every measure taken in pursuit of affirmative action should be accepted as legitimate because of the fact that the object of the distinction is to improve the situation of a disadvantaged group. Criteria to be taken into account in making a determination as to whether or not a given difference in treatment on the basis of affirmative action contravenes the non-discrimination principle, set out below.

- **Non-exhaustive lists of grounds of non-discrimination.** The grounds for non-discrimination listed in the various international instruments are all non-exhaustive. This implies that other ‘unlisted’ grounds exist. A distinction based on such an ‘unlisted’ ground may be arbitrary. At the same time, it is possible that some distinctions based on some of the listed grounds are not necessarily legitimate. But the ground on which a distinction is based is nevertheless important in determining whether the distinction is arbitrary or not.

- **Relevance of ground to right.** It is not the ground itself that is decisive in determining its arbitrary nature, but the ‘relationship’ or the ‘connection’ between the ground and the right in regard to which the distinction is practised. There must be a ‘sufficient connection’ between the ground and the right in regard to which the distinction is practised. In other words, the general aim pursued by the law under scrutiny is not decisive: it is the ‘relevance’ of the particular ground with respect to the particular right that is the decisive criterion.

A distinction introduced by law in the pursuit of a perfectly legitimate goal can be discriminatory and, as such, can constitute a violation of a right if the ground on which the distinction is based is ‘irrelevant’ to the right in question. Particular weight must be attached to the substitution of the word ‘irrelevant’ for the word ‘arbitrary’. The difference lies in the level at which the illegitimate character of the distinction has to be assessed. If this level were to be positioned in relation to the general aims of the law, the assessment would be purely political. The whole point, so it is argued, is that a legal rule is not necessarily legitimate because it pursues a legitimate goal.

The law, as a technique used to attain certain goals, has to respect certain inherent requirements. The most fundamental of these requirements is respect for equality, which prohibits distinctions based on grounds which are ‘irrelevant’ to the particular right. While still requiring a value judgement, which can be influenced by political motives, the evaluation of the relevance of the ground by assessing the connection between the ground and the right concerned, is a judicial act. The

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42UNESC ‘Prevention of discrimination and protection of indigenous peoples and minorities’ progress report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 26 June 2001 at par 91(a).

43UNESC ‘Comprehensive examination of thematic issues relating to racial discrimination the concept and practice of affirmative action’ preliminary report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 19 June 2002 at par 62.
previous identification of the ground as a right (on which the distinction is based) and the matter (the context in which the distinction is practised), reduces the political element to a minimum and safeguards the judicial character of the evaluation.

In essence, then, affirmative action policies are admissible only insofar as they do not contravene the principle of non-discrimination.\(^{44}\)

**SOUTH AFRICA**

**Historical background**

Colonialism, patriarchy and apartheid in South Africa led to racist and sexist practices and laws resulting in systemic, structural discrimination and inequality.\(^{45}\)

Apartheid laws provided for racially segregated societies for blacks, whites and coloureds.\(^{46}\) This was achieved by means of pass laws (controlling the free movement of African people); racial classification; the prohibition of marriage between whites and people of other races; separate and unequal education systems, health services and civic amenities; and racially segregated, zoned living areas.\(^{47}\)

Separate ‘homelands’ and separate citizenship were created for the black population of South Africa.\(^{48}\) Only in 1993 was the independence of the homelands

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\(^{44}\)UNESC Final Report n 33 above at par 112.


\(^{48}\)Regulated in terms of the National States Citizenship Act 26 of 1970. See the Promotion of Bantustan Self-government Act 46 of 1959, replaced by the National States Citizenship Act 26 1970; the Constitution of Bantu Homelands Act 21 of 1971; the Status of the Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1977; the Status of Ciskei Act 110 of 1981. The four latter territories were granted ‘independence’ as ‘homelands’ for black people.
terminated and did black people regain their South African citizenship.49 Citizenship was thus a particularly sensitive issue.50

In the workplace, discrimination was similarly practised by means of specific laws under apartheid. These included the Industrial Conciliation Act,51 which excluded blacks from collective bargaining and the Mines and Works Act,52 which provided for job reservation for whites. Moreover, the Wage Act53 allowed for differentiations in wage determinations based on both race and sex, and the Unemployment Insurance Act54 provided for unequal benefits for men and women. The Public Service Act55 allowed discrimination based on sex. Disabled people have suffered in the workplace mainly through omission than commission, although discriminatory legislative provisions existed in this regard as well.56 The Group Areas Act57 restricted, in particular, the mobility of black, women work seekers.

Constitution

Introduction

The constitution recognises the injustices of the past and sets out the need to establish a society based on equality, dignity and freedom.58 It aspires to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.59 The founding values of the country are stated to be human dignity, the achievement of equality and the advancement of human rights and freedoms,60 and non-racialism and non-sexism.61 The Constitution provides for equality as a right and adopts both a formal, as well as a substantive approach to equality, by outlawing unfair discrimination62 and by providing for affirmative action.63

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52 of 1911 and, later, 27 of 1956.
53 of 1925; later, 44 of 1937; and, still later, 5 of 1957.
54 of 1946; later, 30 of 1966.
55 of 1957; later, 111 of 1984.
56 See Clive Thompson n 45 above at 23.
57 of 1950; later, 77 of 1957.
58 See Preamble, ss 1, 7, 36, 39(1)(a) and 39(1)(b) of the constitution. Similar to the Declaration of Human Rights (see United Nations Introduction above).
59 Preamble of the constitution.
60 See s I(a) of the constitution.
61 See s I(b) of the constitution.
62 Subsections 9(3) and (4) of the constitution.
63 Section 9(2) of the constitution. See Kentridge n 33 above at 14–55; De Waal & Currie n 45 above at 231–234, 264–267; D du Toit et al Labour Relations Law A Comprehensive Guide (2003) 543; Brink v Kitshoff 1996 (4) SA 197 (CC); Prinsloo v Van der Linde 1997 (6) BCLR 759 (CC); President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC); Harksen v Lane NO 1997 (11) BCLR 1489 (CC); Minister of Finance v Van Heerden 2004 (6) SA 121.
Non-discrimination

Non-exhaustive list of grounds of non-discrimination

The constitution, similar to international law, prohibits unfair discrimination against ‘anyone’ on a non-exhaustive list of grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. 64

These grounds have in common that they have been used in the past to categorise, marginalise and oppress people. 65 And, they have the potential, when manipulated, to demean persons in their inherent humanity and dignity. 66

Unlisted grounds of non-discrimination

The fact that grounds are listed in a non-exhaustive manner, implies that, besides the listed grounds, other ‘unlisted’ or ‘analogous’ grounds exist. Such grounds relate to attributes or characteristics which ‘have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner’. 67

Establishing discrimination

To establish discrimination, a distinction must be made between differentiation and discrimination. 68 In terms of this approach, differentiation (in the sense of treating people differently), which may or may not be rationally connected to the purpose it seeks to achieve, does not necessarily constitute discrimination. 69 As to what would constitute illegitimate grounds – thus elevating differentiation into the realm of discrimination – there are two possibilities: the listed grounds, and the ‘unlisted’ grounds. The listed grounds are clearly described and requires an objective test to ascertain whether there was discrimination on such a ground. 70 Different than discrimination on a listed ground, the complainant must prove discrimination on an unlisted ground.

Establishing unfairness of discrimination

Once discrimination on a listed or an unlisted ground has been established, the unfairness of the discrimination must be determined. Discrimination based on a listed ground is presumed to be unfair. 71 No such presumption exists for discrimination based on an unlisted ground: this must be proven by the party alleging such discrimination. In proving such unfairness, the Constitutional Court has indicated the factors relevant as follows: 72

64 See s 9(3) of the constitution.
65 Harksen supra n 63 above at 322J.
66 At 323A–323B.
67 At 322BC.
68 At 320A–321G.
69 At 321G–323B.
70 At 322C–D.
71 Section 9(5) of the constitution.
72 Harksen supra n 63 above at 323H–324E.
Affirmative action and non-discrimination

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage ...;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants ... but is aimed at achieving a worthy and important societal goal, such as, ... the furthering of equality for all, this purpose may, ... have a significant bearing on the question whether complainants have in fact suffered the impairment in question ...

(c) ... any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The focus of the enquiry into the unfairness of the discrimination thus appears to be on the holder of the right, on the position of that person in society, and on the kind of harm suffered by that person. 73

Justifying discrimination

If it has been established that the discrimination is unfair, it is possible to justify it in terms of section 36 of the constitution. This section requires a limitation to be justified only in terms of law of general application, and to the extent that the limitation is reasonable and justifiable in a democratic society based on dignity and equality. 74

The limitations enquiry thus focuses on the purposes, actions and reasons of government, in contrast to the enquiry into the unfairness of the discrimination, which is on the holder of the right. The former revolves around the issue of balancing the right to equality against other rights and aspects of public policy. 75 It considers whether an invasion of an individual’s right to non-discrimination is permissible because of the fact that it serves a legitimate social purpose in a way which is proportionate to the end it seeks to achieve. 76

Citizenship as an ‘unlisted’ ground of non-discrimination

Citizenship is not listed as a ground of non-discrimination in the constitution. However, in Larbi-Odam v for Education (North-West Province), 77 it was held

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73 Kentridge n 33 above at 14–43.
74 Section 36(1)(a) to (e) of the constitution. Factors to be considered in order to establish such reasonableness and justifiability include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation, the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.
75 Kentridge n 33 above at 14–43.
76 Ibid.
77 1998 (1) SA 745 (CC). In this case, the constitutionality of a government regulation prohibiting the applicants (permanent residents employed on contract as teachers) from being permanently employed in state schools was held to be unfairly discriminatory. The court held that there was ‘no doubt’ that the differentiation between citizens and non-citizens in terms of the regulation constituted discrimination (at 756f). Denying permanent residents job security when they had been selected for residence, when they had made a conscious commitment to South Africa, when they had been allowed to live and work in South Africa
that discrimination on the basis of citizenship has the potential to impair the dignity of non-citizens and that, accordingly, differentiation between citizens and non-citizens constitutes discrimination on an unlisted ground. Non-citizens in South Africa were found to be a ‘vulnerable group’ and a minority with ‘little political muscle’. Moreover, citizenship, as such, was found to be a ‘personal attribute’ which was difficult to change. The court held that the general lack of control over one’s citizenship has particular resonance in the South African context, where individuals were deprived of rights under apartheid, ‘ostensibly’ on the basis of citizenship, but ‘in reality’ in circumstances where citizenship was governed by race. It held that: ‘Many people became “statutory foreigners” in their own country under the Bantustan policy.’

The court held that the discrimination was unfair, and in its subsequent application of the limitations clause, it found that the limitation of the right to equality could not be justified.

In another context, in Khosa v Minister of Social Development; Mahlaule v Minister of Social Development, the Constitutional Court held that the exclusion of permanent residents from social security benefits in terms of section 27(1)(c) of the constitution was unfairly discriminatory and unjustifiable under section 36 on the basis that exclusion from these benefits was likely to have a ‘severe impact’ on the dignity of permanent residents. The court stressed that ‘... we value human beings and want to ensure that people are afforded their basic needs’.

Affirmative action

The constitution lays the basis for affirmative action as follows:

...
Affirmative action and non-discrimination

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

It creates a broad category for beneficiaries of affirmative action, namely people who have been "disadvantaged" by unfair discrimination. No specific factors are used to connote disadvantage and no specific categories of disadvantaged people are mentioned. Similarly, it lays a broad basis for measures for redressing discrimination, or methods to remedy inequality.88 Put differently, the concept of affirmative action measures is supported as an acceptable ‘tool’ in the struggle to eliminate discrimination and as a ‘remedial measure’ to ensure that equality can in fact be reached. In the South African context, the reason for affirmative action measures is the achievement of substantive equality – a long-term goal to be achieved through measures aimed at reducing inequality.89 The measures to attain the goal are distinguished from the goal itself.90 In essence then, affirmative action measures are not viewed as a right.91

Employment Equity Act

Introduction

The EEA recognises that, as a result of apartheid and other discriminatory laws and practices, disparities in employment, occupation and income within the South African labour market had created disadvantages for certain categories of people.92 The Act promotes the constitutional right of equality and the achievement of a diverse workforce broadly representative of the South African society.93 It follows

88Hodges Aeberhard n 23 above at 443; Kentridge n 33 above at 14–14, 14–35. In Van Heerden supra n 63 above, it was held that affirmative action measures that properly fall within the requirements of s 9(2) of the constitution, were not presumptively unfair: they constitute a substantive and composite part of the equality protection envisaged by the provisions of s 9 and the whole of the constitution (at 136F–137C). The primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing people disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9(2). The Constitutional Court suggest a three-pronged rationality test to assess whether such measures fall within the ambit of s 9(2). The following questions must be asked: (a) does the measure target people or categories of people who had been disadvantaged by unfair discrimination; (b) was the measure designed to protect or advance such people or categories of people; and (c) does the measure promote the achievement of equality? (at 138C–141A).

89Dupper n 15 above at 292.

90See Dudley v City of Cape Town (2004) 25 ILJ 305 (LC). Effective measures imply that disadvantage will over time be erased so that disadvantaged people will accordingly no longer be entitled to benefit under the affirmative action clause (Dennis Davis, Halton Cheadle & Nicholas Haysom Fundamental rights in the constitution: commentary and cases (1997) at 60). The object of the measures is thus limited to ‘full and equal enjoyment of all rights and freedoms’, and nothing more.

91See Dudley supra n 90 above. See Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) for a different opinion. The latter judgment has, however, been criticised (see Christoph Garbers ‘Is there a Right to Affirmative Action Appointment? (Dudley v City of Cape Town and Another)’ (2004) 13(7) Contemporary labour law 61ff; Marié McGregor ‘The nature of affirmative action: a defence or a right?’ (2003) 15/3 SA Merc LJ 42ff.

92Preamble of the EEA.

93Ibid.
the constitutional model of formal and substantive equality. The EEA has a twofold purpose: first, to achieve equity in the workplace by promoting equal opportunities and fair treatment through the elimination of unfair discrimination, and, secondly, to redress disadvantages in employment and ensure the equitable representation of certain ‘designated groups’ in the workforce by implementing affirmative action measures.

**Non-discrimination**

With regard to the first purpose, the EEA prohibits unfair discrimination against an employee on the same grounds listed in the constitution, and adds three more grounds, namely family responsibility, HIV status and political opinion. Like the constitution, the list is non-exhaustive and implies that other ‘unlisted’ grounds may exist. Again, like the constitution, the EEA provides for a presumption of unfairness if discrimination is based on a listed ground, but for unfairness to be proven by the applicant if discrimination is based on an unlisted ground.

**Affirmative action**

With regard to the second purpose, the EEA provides for affirmative action measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

Similar to international instruments, the EEA holds that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. It establishes ‘designated groups’ — black people, women and people with disabilities — as the benefiting categories of affirmative action. While the EEA does not call for citizenship of members of the designated groups to benefit from affirmative action, this requirement was mooted by the Labour Court in *Auf der Heyde v University of Cape Town*.

**Citizenship**

In this case it was successfully argued that the concept of affirmative action as envisaged by the constitution and the Labour Relations Act (LRA) (which then regulated affirmative action) was one that had been developed against the specific background of South Africa’s discriminatory history.

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94 See s 2(a) of the EEA.
95 See s 2(b) of the EEA.
96 See s 6(1) of the EEA.
97 See s 11 of the EEA.
98 See ss 15.20 of the EEA.
99 See s 15(1) of the EEA.
100 Section 6(2)(a) of the EEA. See *Van Heerden supra* n 63, 88 above.
101 See s 1(2) of the EEA. ‘Black people’ is ‘a generic term for Africans, Coloureds, and Indians. ‘People with disabilities’ connotes people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in employment.
103 66 of 1995. And, one can argue, the EEA as well.
Here, the applicant (a white male on a fixed-term contract) was not appointed to a permanent post, while two other black male colleagues whose circumstances were similar — Chibale, a non-citizen, and Naidoo, a South African citizen — were actually appointed permanently. The applicant alleged, amongst other things, that the University had applied its Equal Opportunity Employment Policy unfairly and selectively. Although it was conceded that the policy was a factor in the appointment of the two black people, the court found that this had not been the overriding consideration — the two were the best candidates and had obtained their permanent appointments on merit. Also, whilst race was a factor in their permanent appointment, the fact that the applicant was white and did not in the particular circumstances qualify for special consideration in terms of the policy, played no part in the decision not to extend his contract or appoint him permanently.

The Labour Court, however, found merit in the applicant’s submission that the policy should have applied only to previously disadvantaged South African citizens. It endorsed the arguments that the legacy of discriminatory practices which the University’s policy was designed to address were those of ‘this country’; that it must be directed towards the pool of available ‘South African talent’; that the imbalances sought to address were ‘South African imbalances’; and that the concept of affirmative action envisaged by the constitution and the LRA was one developed against the background of South Africa’s discriminatory history. In essence then, the court found that South African blacks and women constituted the ‘target beneficiaries of affirmative action, or, that ‘nationality’ is essential to benefit under affirmative action.

On appeal, the issue of citizenship in order to benefit from affirmative action came to the fore again. The Labour Appeal Court assumed, however, that Chibale’s appointment did not qualify as an affirmative action appointment in terms of the University’s policy. It found that Chibale was appointed on merit: he was regarded as an asset to the University, and, being black, he could serve as role model for black students.

**Discussion**

It is submitted that the Labour Court in *Auf der Heyde* essentially interpreted the issue of ‘citizenship’ correctly in that the main focus of affirmative action in South Africa must be on blacks and women who are citizens. Such an approach promotes the value of equality that underlies the new democratic order, with

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104 At 891H–892A.
105 At 892A–B.
106 At 893F–H.
107 At 893H. It was noted that the applicant’s assumption that he — a South African citizen and qualified in every other respect — should have been appointed instead of Chibale, was incorrect, since he lacked certain qualifications (at 895D).
108 *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) at 2656E.
109 At 2656E–F. Regarding Naidoo’s appointment, the court held that the fact that he was appointed as a result of an irregular application of the policy could not have caused Auf der Heyde to expect that he would similarly be appointed.
citizenship a particularly sensitive issue under apartheid. But the approach in Auf der Heyde is disagreed with if the judgment implies that only citizens may benefit from affirmative action.

The South African community is made up of citizens and foreigners. And, apartheid policy discriminated not only against South African blacks but also against other groups, particularly Africans from neighbouring countries. For example, for many years South Africa drew heavily for its unskilled labour requirements on its neighbouring countries, namely Lesotho, Mozambique, Botswana and Swaziland. Specific sectors, such as mining and agriculture, recruited large numbers of migrant workers. Such migrant workers were employed on temporary contracts, usually renewable every 12, 18 or 24 months, and were repatriated to their countries of origin once the contracts expired. These workers were usually guaranteed of returning to the same job within a specified period of time. Because of the temporary nature of their contracts, even if they had worked continuously for many years in South Africa, they could not qualify for permanent residence or citizenship.

This discrimination also needs to be remedied. In this regard, it is submitted that it is possible to affirm non-citizens as a ‘category’ of people disadvantaged by unfair discrimination in the past because of the broad wording of both the constitution in section 9(2) — laying the basis for beneficiaries of affirmative action to be ‘persons, or categories of persons, disadvantaged by unfair discrimination’ — and the EEA in its Preamble — recognising disparities in employment ‘as a result of apartheid and other discriminatory laws and practices’.

110 See Marie McGregor The application of affirmative action in employment law with specific reference to its beneficiaries: A comparative study unpublished LLD thesis UNISA (2005) at 167–184 for an evaluation of the Auf der Heyde case, the constitution and the EEA in terms of modern interpretation theory of statutes.

111 See Labour Market Report n 47 above at 175; Wiehahn Report n 46 above at part 6 paras 2.7–2.11; Van Jaarsveld n 1 above 408–411.

112 See Labour Market Report n 47 above at 169; 175; Wiehahn Report n 46 above at part 6 paras 2.7–2.11; Leonard Thompson n 45 above at 167–170, 181, 186, 192–193, 230. Usually in terms of bilateral treaties between South Africa on the one side, and Mozambique, Lesotho, Botswana and Swaziland on the other side (Labour Market Report n 47 above at 172, 174–175). Workers admitted under these treaties had fewer rights than people admitted under the then Aliens Control Act 96 of 1991 (subsequently repealed by the Immigration Act 134 of 2002). Generally, the latter could apply for citizenship after a period of permanent residence of five years, while the former could not, even after lengthy periods of working in South Africa.

113 See again McGregor n 110 above.

114 Kurt Glaser & Stefan T Possony Victims of politics. The state of human rights (1979) at 337–338; Labour Market Report n 47 above at 175–176, 179, 181. The National Union of Mineworkers and the Chamber of Mines requested the Labour Market Commission to end the unequal treatment of migrant workers from the Southern African region in 1996. The Labour Market Commission recommended that a preferential policy be adopted in relation to the South African Customs Union countries and Mozambique in terms of which skilled workers from these countries would be granted access to the South African labour market on a continuing basis, and in all sectors. Essentially, the Labour Market Commission held, that entry for work should be based on the need to redress past injustices regarding access to the South African labour market.

115 See again McGregor n 110 above.
An approach that focusses on affirmative action for mainly South African citizens, but which also goes further and includes other groups on the receiving end of apartheid and other discriminatory laws and practices, is mooted. Non-citizens who have suffered discrimination, such as migrant workers, may be able to benefit under affirmative action or other suitable measures to redress past disadvantages. Such an approach takes into account both the country’s history as well as its present aspirations to achieve non-racialism, equality, and diversity.

This approach was recently confirmed by amendments to the Regulations issued in terms of the EEA. The definition of ‘designated groups’ found in section 1 of the Act has been amended in the Regulations to mean:

- Black people (ie Africans, Coloureds and Indians), women and people with disabilities who are natural persons and:
  - are citizens of the Republic of South Africa by birth or descent; or
  - are citizens of the Republic of South Africa by naturalisation before the commencement date (i.e. 27 April 1994) of the Constitution of the Republic of South Africa of 1993; or
  - became citizens of the Republic of South Africa from the commencement date of the Constitution of the Republic of South Africa of 1993, but who, not for Apartheid policy that had been in place prior to that date, would have been entitled to acquire citizenship by naturalisation prior to that date.

This amendment appears to clarify that the focus of affirmative action measures in terms of the EEA is on South African citizens, but that foreigners which had been unable to acquire citizenship because of apartheid policy, are not excluded altogether from the benefits of such measures.

APPLYING INTERNATIONAL LAW TO SOUTH AFRICAN LAW
The EEA, with the constitution as its basis, authorises affirmative action in the workplace as a remedy to achieve equality. It creates three designated groups on the grounds of race, sex and disability as the beneficiaries of affirmative action. Race, sex and disability constitute ‘listed’ grounds of prohibited discrimination in

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116 See Brink supra n 63 above at 217C–D which held that although the South African history is one in which the most visible and most vicious pattern of discrimination has been racial, ‘other’ systematic motifs of discrimination were also inscribed on the country’s social fabric. The court held that the drafters of the (interim) Constitution recognised that ‘systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm’.

117 See McGregor n 110 above at 468–470 for arguments on evidence of past discrimination.

118 Preamble and s 1 of the constitution; Preamble of the EEA.

119 GN 480 in GG 28858 of 26 May 2006 subsequently replaced by another set of amended regulations GN 8471 in GG 29130 of 18 August 2006. The constitutionality of these provisions (as law of general application) may, in principle, be tested in terms of s 36 of the constitution (see Justifying discrimination above; fn 127 below). It must be pointed out, however, that changing the definition of ‘designated groups’ contained in the Act by way of regulation, seems questionable.
terms of both the constitution and the EEA. Discrimination on these grounds generally contravenes the principle of equal treatment and presumptions of unfairness exists in their favour. However, South African law acknowledges inequality for blacks, women and the disabled, as categories of people who have been discriminated against in the past under apartheid and patriarchy. The law endeavours to address these inequalities by affirmative action measures based on the very grounds on which the inequalities came about. In this context, the use of the grounds of race, sex and disability then do not constitute ‘arbitrary’ or ‘illegitimate’ distinctions and are therefore not discriminatory. It can thus be said that the grounds or distinctions used are relevant to, or that there is a ‘sufficient connection’ between them and the right to equality (the context in which the distinction is practised). ‘Different treatment’ in this sense aims at remedying inequality. This is in accordance with the principles of international law.

The argument will be taken one step further in an endeavour to establish whether an analogous application to the issue of citizenship can be found as a requirement to benefit from affirmative action, as mooted initially in Auf der Heyde supra, and subsequently formalised by amendments to the Regulations to the EEA.

In assessing the use of citizenship in the context of affirmative action, the question which needs to be answered is whether the use of citizenship in this particular context, can be argued, generally, to be discriminatory, and, if so, unfairly discriminatory against non-citizens in South Africa. In this regard, it was seen above that ‘citizenship’ is not listed as a ground of discrimination in either the constitution or the EEA, but it has been interpreted to be an ‘unlisted’ ground in Larbi-Odam supra. Having determined that ‘citizenship’ is an ‘unlisted’ ground, the next step is then to establish the possible unfairness of the use of citizenship in the affirmative action context.

The unfairness of discrimination based on an ‘unlisted’ ground is not presumed in terms of the constitution or the EEA. This must be proven on the basis of certain factors as laid down by the Constitutional Court. When applying these factors, it is submitted that first, when considering the position of non-citizens in society, and whether they have suffered from patterns of disadvantage in the past, it cannot

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120 See Non-exhaustive list of grounds of non-discrimination above.
121 See par Establishing unfairness of discrimination above.
122 See Relationship between affirmative action and non-discrimination above.
123 All constitutional rights, except those specifically reserved for citizenship in the constitution itself, (ss 3, 19, 20, 21(3), 21(4), 22) may be invoked by non-citizens (IM Rautenbach & EFJ Malherbe Staatsreg (2004) at 56–57). This should not be taken to mean that non-citizens will be able to claim equal treatment with citizens in every respect, but merely that the fact of non-citizenship is not sufficient per se to justify the denial of any particular right to non-citizens (Gretchen Carpenter ‘Equality and non-discrimination in the new South African constitutional order (3): the saga continues’ (2002) 65 THRHR at 39). Non-citizens, therefore, may be treated differently from citizens, but they are not without rights (Rautenbach & Malherbe ibid). Note, however, that it is argued that affirmative action is not a right (see Affirmative action above).
124 See Citizenship as an ‘unlisted’ ground of non-discrimination above.
125 See Establishing unfairness of discrimination above.
be denied that they generally constitute a vulnerable minority group and have suffered from discrimination in the past, in terms of both listed and unlisted grounds, and related to apartheid – a race-based policy – but possibly also on grounds unrelated to such policy.

Secondly, it is submitted that the nature and purpose of affirmative action are not aimed at impairing the dignity of foreigners, but are aimed mainly at achieving equality for millions of South African citizens, a worthy goal against the background of apartheid which had separate citizenship for black and white South Africans. It can be argued that affirmative action mainly for citizens is one occasion, generally speaking, on which non-citizens will not be able to claim equal treatment with citizens. Put differently, the nature of and the purpose sought by such discrimination make it clear that it is directed at furthering substantive equality for South African citizens, a worthy domestic goal. In this context, it may then be questionable whether non-citizens suffer impairment of their dignity as a result of a main focus on affirming citizens. It is submitted that it cannot generally be said that, in this instance the dignity – the intrinsic value or worth – of non-citizens is affected.

Thirdly, other relevant factors, including the extent to which the discrimination has affected the rights and interests of non-citizens, must be considered. In this regard, it is submitted that it cannot be said that a focus primarily on citizens and ‘discrimination’ in this sense has affected the rights or interests of non-citizens, or has affected their dignity, or that an impairment of a comparably serious nature has been inflicted on them. It is submitted that a primary focus on affirmative action for citizens does not indicate any inferiority on the part of foreigners, but is a context-specific measure to rectify previous, large-scale unfair discrimination suffered by South Africans, with citizenship a particularly sensitive issue. It does not indicate that non-citizens are less worthy of the right to non-discrimination, but that the purpose of affirmative action is mainly one of achieving equality for a majority of black people and women who have to be affirmed. It is submitted that, even though using citizenship as a criterion to benefit mainly South African citizens may be potentially discriminatory against non-citizens (on the basis of an ‘unlisted ground’, and potentially unfairly discriminatory in that it may affect non-citizens’ dignity, (as demonstrated by Lari-Odam supra and Khosa supra)\(^{126}\) its use can be generally justified in the context of South Africa’s history.\(^ {127}\) The ground of citizenship thus finds proper, analogous application in terms of international law, (similar to race, sex and disability) in that it does not constitute an ‘arbitrary’ or ‘illegitimate’ distinction and is therefore not discriminatory.

However, as indicated earlier, this approach must be qualified. Foreigners which had been discriminated against, may also benefit from affirmative action

\(^{126}\)See Citizenship as an ‘unlisted’ ground of non-discrimination above.

\(^{127}\)Accordingly the limitations enquiry in terms of s 36 of the constitution does not come into play.
measures. In this context, the use of the ground of ‘non-citizenship’ will be ‘relevant’, and will therefore be non-discriminatory.

CONCLUSION

In essence then, in assessing the use of race, sex and disability – the designated groups being blacks, women and the disabled in terms of the EEA – as grounds or distinctions on which affirmative action is practised, it can be said that these grounds are ‘sufficiently connected’ or ‘relevant’ to the right to equality and affirmative action as a means to attain same in the South African context. These grounds are thus not ‘arbitrary’ and therefore not discriminatory, and complies with international law.

The use of citizenship in the affirmative action context to mainly benefit citizens, was seen to be similarly justified in the context of the country’s history and to be in compliance with international law, but not in an absolute way. Foreigners may in certain circumstances also benefit from affirmative action measures to address past discrimination against them. The use of citizenship therefore cuts both ways: to place the main focus of affirmative action measures on South African citizens, but also to include foreigners under such measures in certain circumstances.

128 See Discussion above.
129 See Citizenship and Discussion above.
130 Or other suitable measures in terms of s 9(2) of the constitution.