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PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

The concept and practice of affirmative action

Progress report submitted by Mr. Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5

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Introduction

1. In its resolution 1998/5, the Sub-Commission decided, since the subject required careful and comprehensive inquiry, to appoint Marc Bossuyt as Special Rapporteur with the task of preparing a study on the concept of affirmative action, and authorized him to request the United Nations High Commissioner for Human Rights to send out a questionnaire to Governments, international organizations and non-governmental organizations inviting them to send all relevant national documentation on affirmative action.

2. In its decision 1999/106, the Sub-Commission renewed its authorization to the Special Rapporteur to make that request. The questionnaire was sent to Governments, international organizations and non-governmental organizations.

3. The present report is submitted in accordance with Sub-Commission decision 2000/104, in which the Sub-Commission, recalling Economic and Social Council decision 1999/253, expressed its appreciation to the Special Rapporteur for his preliminary report (E/CN.4/Sub.2/2000/11 and Corr.1) and decided to request the Secretary-General to remind Governments, international organizations and non-governmental organizations that had received the questionnaire to submit their responses. In that regard, the Special Rapporteur would like to express his deep gratitude to the Governments of Bolivia, Colombia, Greece, Guatemala, Israel, the Libyan Arab Jamahiryia, Pakistan, Paraguay, the Slovak Republic, Spain, Thailand, Trinidad and Tobago, and the United Republic of Tanzania, as well as to the International Labour Office and the Universal Postal Union, for their substantive replies to the questionnaire. Before using these contributions, the Special Rapporteur would prefer to receive more replies so that his next report would be based on the widest possible information. He therefore encourages Governments, international organizations and non-governmental organizations which have not done so to answer the questionnaire. The questionnaire is attached to the present report for ease of reference.

4. In the previous, preliminary report, two limits set by international law with respect to affirmative action were pointed out: (a) affirmative action may not lead to discrimination and (b) affirmative action has to be of limited duration.

5. This progress report will focus mainly on who is to benefit from affirmative action (the target group), what the justifications are for affirmative action and the forms affirmative action can take.

I. THE CONCEPT OF AFFIRMATIVE ACTION

6. “Affirmative action” is a term used frequently but, unfortunately, not always with the same meaning. While in the minds of some the concept of “affirmative action” is also covered by the term “positive discrimination”, it is of the utmost importance to stress that the latter term makes no sense. In accordance with the now general practice of using the term “discrimination” exclusively to designate “arbitrary distinctions”, the term “positive discrimination” is a contradictio in terminis: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called “discrimination”, or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled “positive”. On the contrary, the term

"positive action", a term more often used in the United Kingdom, is equivalent to the term "affirmative action". In many other countries, such action is known as "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment", etc.

7. As a legal concept, "affirmative action" takes a place in both international and in national law. However, it is a concept without a generally accepted legal definition. Any serious discussion on the concept of affirmative action requires, however, as a prerequisite, a working definition:

> "Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."

8. Policies of affirmative action can be carried out by different actors belonging to the public sector, such as the federal Government or State and local governments, and to the private sector, such as employers or educational institutions.

9. In some countries, these affirmative action policies are voluntary and encouraged; in other countries, they are compulsory and failure to fulfil this obligation is sanctioned. The policies are not limited to employment and education: they can also be extended to housing, transportation, the ballot box, training, appointments to political, executive and judicial posts, the award of contracts or scholarships, etc.

II. TARGET GROUPS: ISSUES OF OVER- AND UNDER-INCLUSIVENESS

10. Affirmative action is always directed to a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is based and who find themselves in a disadvantaged position. Although this characteristic is often innate and inalienable, such as gender, the colour of their skin, nationality or membership of an ethnic, religious or linguistic minority, it does not necessarily always have to be so. As such, past and present affirmative action programmes have been concerned with women, blacks, immigrants, poor people, disabled persons, veterans, indigenous peoples, other racial groups, specific minorities, etc.

11. A crucial question, and one which will induce much disagreement, will be how to decide which groups are sufficiently disadvantaged to deserve special treatment. Although some international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women are particularly relevant, it will often be national legislation that identifies who may benefit from affirmative action provisions.[1]

12. Affirmative action often arises from the confluence of two factors: (i) the existence of a persistent status of inequality, which is not always recognized as such, and (ii) the effective articulation of a legal right to relief by representatives of the underprivileged group.[2] Often, groups will lack the political strength and support to have themselves acknowledged as disadvantaged.[3] This results in under-inclusiveness of affirmative action programmes.

13. The reverse can happen too. Groups may be classified as disadvantaged, even if they do not want to be regarded as such because of fear of stigmatization or because they are not in favour of affirmative action. Therefore, consent of the members of the target group is crucial.

14. National legislation usually starts with an affirmative action policy that is aimed at a particular disadvantaged group. Yet, the policies are often expanded to other groups. This raises the issue of over-inclusiveness, because sometimes membership in certain groups defined by race, ethnic background or gender is used as a proxy for disadvantage. The genuineness of the relationship between affirmative action and compensation for past or societal discrimination depends on the extent to which race, ethnic background or gender is indeed an indicator of the social evil which the affirmative action programme is intended to remove and the extent to which taking race, ethnic background or gender into account is an appropriate method of combating discrimination. It can occur that affirmative action will benefit some people even though they themselves have not been disadvantaged by past or societal discrimination.[4] Especially in the United States, this has provoked some discussion.[5] Whereas affirmative action was originally aimed at African Americans, these efforts were, over time, also directed to redress the inequality of other deprived groups, most of them immigrants.[6] The question arose of whether these immigrants, who came voluntarily to the United States, deserved the same protection as African Americans, who were forced into slavery.[7] In essence, the protected groups in the United States comprise a range of individuals who have different legal bases for claims for redress: descendants of free immigrants, of conquered peoples and of slaves.

15. Another issue is the two-class theory, which raises the question of who truly benefits from preferential policies. It appears that it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures. For instance, affirmative action aimed at women will often benefit more white middle-class women than lower-class women of another ethnicity. Or, when affirmative action benefits a broad category, such as Hispanics or Asian Americans, some ethnic groups within those categories will obtain more advantage than others, because they are already high ranking in economic, educational and occupational status. In other words, beneficiaries of affirmative action programmes tend to be the wealthier and least-deprived members of a group.

16. This two-class theory may result in the creation of yet another “disadvantaged” or “discriminated against” minority within the majority. It is likely that affirmative preference programmes create new disadvantaged groups. Indeed, the majority members who miss out on a desired social good as a consequence of an affirmative preference programme are likely to come from the bottom of the white or male distribution, whereas the minority members who benefit from such programmes are likely to come from the top of the minority or female distribution.[8] Thus affirmative preference may well shift the social burden from one group to another.

17. It may be rather complex to establish whether or not an individual belongs to the target group. For example, how “black” does someone have to be to qualify as “black” in order to be entitled to benefit from affirmative action schemes? As far as immigrants are concerned, it is not always clear which persons still qualify as immigrants when they are second, third or fourth generation immigrants? What about children of mixed marriages? Moreover, there are already cases of individuals or entire groups who redefine themselves and who claim some status in order to benefit from the affirmative action measures.[9]

18. Some favour the creation of a new law on personal ethnic and racial status to define those who are eligible for these benefits. Others state that the self-perception of the group and the perception of the wider community in the midst of which the group exists are decisive. Naturally, this perception can change with the passage of time. In this context, General Recommendation VIII of the Committee on the Elimination of Racial Discrimination concerning the interpretation and application of article 1, paragraphs 1 and 4 of the International Convention on the Elimination of Racial Discrimination is particularly interesting.[10] After considering information in States parties' reports concerning the ways in which individuals are identified as being members of a particular racial or ethnic group, the Committee stated that such identification should, if no justification existed to the contrary, be based upon self-identification by the individual concerned.

19. It is clear that selecting and defining the target groups for affirmative action programmes present a major problem. This illustrates the importance of not basing affirmative action solely on group membership, but of taking other factors, such as socio-economic factors, into account to verify if someone qualifies for affirmative action. This means a more individualized approach towards affirmative action, awarding opportunities to an individual on the basis of individual needs, rather than only on the basis of group membership.[11]

III. ASSESSING THE JUSTIFICATION OF AFFIRMATIVE ACTION

20. When introducing an affirmative action policy, States will try to justify it vis-à-vis public opinion. The grounds given as justification will mainly depend on the specific social context of the State in question. Some of the most common justification grounds will be discussed below, as well as the counter-arguments made against them.[12]

A. To remedy or redress historical injustices

21. The aim is to compensate for intentional or specific discrimination in the past that still has repercussions today. Certain disadvantaged groups have been subjected to discrimination for long periods, which has put their descendants in an underprivileged position because of, for instance, poor education and training. Chibundu argues that affirmative action would here be corrective, restoring the group to the position it would have occupied but for the past injustice. Yet, he goes on to say, rarely can a mathematically precise causal relationship be conclusively demonstrated between a past wrong and current under-representation.[13] Nonetheless, where some degree of causal relationship between past wrongdoing and present under-representation can be shown, affirmative action can be applied, although its direct and specific beneficiaries need not be identical to the actual victims of the past discrimination.[14]

22. This justification was and is mainly used in the United States to support the public policies intended to "overcome the present effects of past racial discrimination" against African Americans. United States affirmative action programmes originated in Executive Order 10925 of President John F. Kennedy in 1961 and Executive Order 11426 signed by President Lyndon Johnson in 1965.[15] As such, the United States Commission on Civil Rights maintained: "Affirmative action encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to

prevent discrimination from recurring in the future".[16] The same rationale is, for instance, used by the Government of Australia in its affirmative action policy towards Australian Aboriginals.

23. However, opponents argue that there might be a dispute about whether the problem of disadvantage is one of current discrimination or the lingering effect of past discrimination. Although it is tempting to imagine that the contemporary troubles of historically wronged groups are due to those wrongs, Sowell believes that this is confusing causation with morality. He maintains that the contemporary socio-economic position of groups in a given society often bears no relationship to the historic wrongs they have suffered.[17] It cannot be denied that it will be very difficult for affirmative action programmes to meet the test of proximity in causation, and the cost of establishing such proximate cause may well exhaust the benefit that might arguably ensue.[18] This will be more difficult in a legal system that treats claims as individual rather than collective, making it hard to demonstrate the connection between past wrongdoing and present entitlement. Moreover, who is to determine the proper compensation? And how far back in time does one have to go? All this calls into question the desirability of backward-looking policies.

24. Yet, Chibundu contends, the fact that that a fit between past wrongs and present needs cannot be readily established argues not against affirmative action, but against the justification for it. A forward-looking justification - one that anchors for example the claims of African Americans for redistributive justice not on the past, but on the pragmatic needs of the present and the aspirations of the future - would impose less strain on the acceptance of affirmative action.[19]

B. To remedy social/structural discrimination

25. The fact that disparities continue to exist in educational, social, economic and other status, indicates that the granting of equality for all before the law establishes formal equality but is insufficient to address adequately practices in society that lead to structural discrimination. In essence, the notion of structural discrimination encompasses all kinds of measures, procedures, actions or legal provisions which are, at face value, neutral as regards race, sex, ethnicity, etc., but which adversely affect disadvantaged groups disproportionately without any objective justification. This form of discrimination can occur in two ways: one can deliberately conceal one's intentions behind objective criteria; or one can very well act in good faith when requiring certain job skills. Nevertheless, both practices result in indirect or covert discrimination. For example, a minimum height requirement may disproportionately disadvantage women and Asians, and may be an unjustifiable job requirement, when there is no objective need for it, as can be physical tests or writing tests. Such discrimination is not always detectable on the surface. The traditional concept of non-discrimination principle only takes a neutral stance, i.e. that of de facto equality, and redresses only express or direct discrimination.[20]

26. Opponents dispute whether the problem is one of structural discrimination at all, or instead is due to a combination of other factors. When a social problem is deep-seeded, neither the non-discrimination principle nor affirmative action will help integrate disadvantaged groups. For instance, large-scale inequalities in access to and especially in the quality of education can induce a widespread inability to compete effectively for employment. Complementary

interventions, such as poverty programmes, will be needed to overcome other dimensions of the social problem. The State is then compelled to redistribute resources to enforcement, remedial and broader-based interventions in order to ensure access to quality education, for example.

27. In the proponents' view, this distributive justice argument is in itself a form of affirmative action, as resources will be assigned for the benefit of a certain group to ensure that this group will enjoy equality in fact. Redistribution is then a political arrangement benefiting disadvantaged groups. Moreover, it cannot be said to entail discrimination, as the economic burden of the redistribution of resources is placed upon the society as a whole.

C. To create diversity or proportional group representation

28. Recently, American critical race theorists and other scholars have set out another theoretical basis for affirmative action, namely that the presence of racial and ethnic diversity within the academy and workplace is a necessary component of a just society.[21] In fact, they maintain that a racially and ethnically diverse environment reflects the larger society and promotes a more representative and enriched sense of community. "Positive diversity" seems to them a better approach to achieving compensatory justice for racial and ethnic minorities, and they therefore argue that diversity as a rationale for racial preferences needs to be separated from affirmative action.

29. The notion of diversity as a justification for racial preferences in the context of higher education first appeared in DeFunis v. Odegaard (416 U.S. 312, 1974).[22] In his dissenting opinion, Justice Douglas wrote that it seemed apparent to him that the Supreme Court jurisprudence weighed against the use of racial preferences for remedial purposes, unless "cultural standards of a diverse rather than a homogenous society are taken into account". This diversity rationale was later on applied in Regents of the University v. Bakke (483 U.S. 265, 1978). Justice Powell, writing for the majority, reasoned that race could be used as one of many factors when making admission decisions. The permissible goal was the university's interest in a diverse student body. Academic freedom was felt to include the right to select students, such as that different students could bring diverse backgrounds to the campus and that the educational experience could be enriched for everyone.[23]

30. In the same vein, Australia's Civil Service Reform Act of 1978 declares that its purpose is to produce "a work force reflective of the Nation's diversity", meaning proportional group representation.[24]

D. Social utility arguments[25]

31. Proponents of affirmative action often point to the many social goals such a policy would likely serve. A well-designed policy of affirmative action would increase the well-being of many people in different ways.

32. Affirmative action might result in better service to disadvantaged groups, in the sense that professionals from a disadvantaged group have a better understanding and knowledge of problems affecting disadvantaged groups. Furthermore, when members of disadvantaged groups occupy positions of power and influence, the interests of all disadvantaged groups will be better

perceived and protected. Fair and visible representation of these disadvantaged groups in various fields, such as employment or education, would provide for better social and political effectiveness in these fields.

33. Another argument is that affirmative action can provide disadvantaged communities with role models which can give them important incentive and motivation. Moreover, the greater participation of members of disadvantaged groups in different social environments will destroy vicious stereotyping and prejudices still exercising a tenacious hold in many societies.

34. However, there are also counter-arguments. Alongside more theoretical questions, such as how social well-being is to be defined, there are more practical questions. Many argue that this kind of affirmative action brings with it risks to quality. Giving preference to less-qualified persons, solely on the basis of group membership, risks reinforcing stereotyping, instead of achieving the opposite, because of, for example, reduced efficiency in industry and education caused by the lowering of qualification standards. It may actually perpetuate thinking along racial lines.

E. To pre-empt social unrest

35. It may not be ignored that affirmative action programmes ranging from special programmes for disadvantaged areas and gender preference programmes of the European Union to regional quota programmes of India and Nigeria, are being actively used both to promote the interests of underprivileged members of society and to balance internal inequalities of economic and political power, with the hope of pre-empting social unrest.[26]

36. During the 1960s, the United States was confronted with various racial riots, which came as a complete surprise to many Americans, not only because the riots mostly took place in northern cities, but also because they happened after the Civil Rights Act and the Voting Rights Act came into power, in 1964 and 1965 respectively. It had finally been forbidden to make any distinction on the basis of race in United States society and the black community had been given the right to vote; but this was still not sufficient for many militant black leaders. Following the very bloody and violent riots in Watts in 1965, the situation was seen as sufficiently threatening by United States politicians for them to take action. Both President John Kennedy and President Lyndon Johnson understood that race relations in the United States had never been so critical. Besides the establishment of poverty programmes, such as President Johnson's famous "War on poverty", an attempt was made to reduce black unemployment through strong affirmative action programmes, such as controversial quotas. According to President Johnson: "You can put these people to work and you won't have a revolution because they've been left out. If they're working, they won't be throwing bombs in your homes and plants. Keep them busy and they won't have time to burn your cars."[27]

37. Yet, Sowell rejects the belief that an even distribution of groups across sectors of the economy tends to reduce social frictions and hostility. He claims that history suggests the opposite and that such policies may even risk being counterproductive.[28] This cautionary note is illustrated by the experiences of Malaysia.

38. Around 1969, it became clear in Malaysia, that only a small group of the ruling elite had benefited from affirmative action schemes, while the overall economic position of the Malays was adverse. Various grave racial riots broke out, the Parliament was suspended and Malaysia was ruled until 1971 by the National Operations Council (NOC). In 1971 the Constitution Amendment Act was passed. It permanently removed from legal public debate certain "sensitive" issues, such as language, citizenship and the special position of the Malays, by entrenching these issues in the articles of the Constitution and by amending the 1948 Sedition Act so that it is now seditious, even in Parliament, to question the principle underlying these "sensitive" issues. It became an offence even to discuss article 153 of the Constitution (see para. 41 below) and the affirmative action provisions accorded to Malays. The purpose of these amendments, which are still upheld by the courts, was "to avoid the racial politicking that had contributed to the race riots".[29]

F. Better efficiency of the socio-economic system

39. Some economics argue that the elimination of discrimination against disadvantaged groups will serve the efficiency and justice of the socio-economic system. The working of the labour market can be optimized if the present imperfections caused by irrational prejudices are corrected.[30] In the United States and Canada affirmative action is promoted as "good for business" and several companies have made "equal opportunity" a "business objective".[31] However, the fact should not be overlooked that financial benefits, such as tax reductions, compensation or government contracts, are often awarded to companies or institutions that apply affirmative action policies; or, on the other hand, that sanctions can be placed on companies or institutions that do not comply.[32]

G. A means of nation building

40. At the dawn of a new State, efforts are made to create a more egalitarian society and a common nationality to strengthen its sovereignty. Many examples of such efforts have been given by States that gained their independence after a long period of colonization. These States found themselves divided in ethnic conflict or were aware of several groups that were lagging behind.

41. In 1957, the Constitutional Commission of Malaysia recognized the vulnerable position of Malays as opposed to non-Malays, such as Chinese and Indians, who wielded large economic power. Of interest is the Commission's account of the existence of affirmative action as a major part of colonial policy. As Philips notes, it is a good illustration of a situation where affirmative action was being utilized to compensate for a lack of development, rather than being used to remedy past discrimination.[33] The Constitutional Commission recommended that, because of the prevailing circumstances, it was necessary to continue the affirmative action measure: "The Malays would be at a serious disadvantage compared with other communities if they were suddenly withdrawn. But with the integration of the various communities into a common nationality, which we trust will gradually come about, the need for these preferences will gradually disappear". The Constitutional Commission modelled its recommendations on the affirmative action provisions of the Indian Constitution, and are now to be found in article 153 of the Federal Constitution of Malaysia. Its provisions mainly concern the reservation of permits

or licenses for the operation of any trade or business for Malays and natives of any of the states of Sabah and Sarawak and the reservation for them of places at any university, college or other educational institutions.

42. Philips explains his view as to why the non-Malays accepted the introduction of article 153. It took an informal "bargain" among the three main political parties. "The leaders of these three parties agreed that the Malays, as the indigenous race, should be recognized as primus inter pares and should assume major political control. In return, the non-Malays were promised that there would be no interference in their economic pursuits. In return for acceptance of Malay special rights, the non-Malays would be granted favourable revisions in citizenship regulations, including the granting of jus soli in the Federation after independence." It was agreed that the "special rights" provisions of article 153 would remain in place for a period of 15 years from the date of independence. However, the course of events and, in particular, the race riots of 1969 led to the removal of the 15-year time limit. Article 153 is now a permanent feature of the Constitution.

43. The Nigerian Constitution of 1979 imposes an obligation actively to encourage the national integration of the more than one hundred different ethnic groups. To ensure that there shall be no predominance of a few groups over all the others, a quota system operates which gives shares of government employment to citizens of the 21 states of the Federation. The Cabinet, for instance, must contain one person from each state and the army must reflect the federal character of Nigeria. These 21 states do not correspond with the various ethnic groups, as the aim was to replace ethnic loyalties by regional and political loyalties based on local power units.[34]

44. Since the historic elections of 1994, the Government of South Africa has found itself faced with enormous challenges. According to Andrews, "the new South African Government recognized that the euphoria of political transformation would be enormously deflated if the economic status quo were not modified. In brief, political rights had to lead to economic gains for a significant proportion of the population if the new democracy was to survive. Since post Cold War political realities put paid to any socialist aspirations, only certain limited options were possible in the new paradigm. One such option drawn from elsewhere was affirmative action."[35] Affirmative action in South Africa has been used differently than in other societies, where affirmative action was largely seen as a mechanism of redress applied to minorities. How to apply it then to a majority?[36]

45. Because of the legacy of apartheid, the accumulation of human capital in South Africa a precondition for successful economic development and growth, had been stifled. Therefore, socio-economic rights could not be ignored in the new Constitution and were included as fully justiciable in the Bill of Rights. It is within this context that affirmative action is located and is viewed as a transformational measure. Although there is a commitment in the Bill of Rights to non-racialism, in section 9 the need for affirmative action as an important element in the overall goal of political and economic reconstruction of the society is also recognized. Both in constitutional directives and in the Reconstruction and Development Programme (RDP), affirmative action becomes an integral part of the transformation project, not only concerning the political status quo but the socio-economic edifice as well. The RDP aims are to harness South Africa's human capital to transform the economy and the society.[37]

IV. FORMS OF AFFIRMATIVE ACTION

46. The core problem of affirmative action will be the transformation of the above-aspired objectives into legally binding undertakings. Affirmative action is often treated under a generic heading, as though affirmative action measures are uniform. Yet, an ILO study by Hodges-Aeberhard and Raskin demonstrates that, in reality, the methods by which these objectives are operationalized may vary too: compliance with affirmative action legislation can be demonstrated by implementing a range of policies developed to suit a particular context.[38] Some forms of affirmative action will be more effective or appropriate to promote equality than others, depending on the particular context and the political choice that has been made. Moreover, as was pointed out in the preliminary report, affirmative action measures must always comply with the principle of non-discrimination.

A. Affirmative mobilization

47. Through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution.[39] This can occur through announcements or other recruitment efforts, where it has been made sure that they actually reach the targeted groups. An example would be the setting up of job-training programmes to enable members of minorities to acquire the skills that would allow them to compete for jobs and promotion. The rationale is that equality in fact will not be achieved if the effects of discrimination have deprived people of the opportunities to acquire the skills that are necessary for competing effectively.[40] Affirmative recruitment would, therefore, through remedial interventions such as job training, out-reach and other skill-building or empowerment programmes, place those who have been disadvantaged in a condition of competitiveness. It can also mean seeking out and raising awareness among members of disadvantaged groups who might not know of benefits available to them in the field of housing or other social goods.

2. Affirmative fairness

48. Affirmative fairness means that there will be a meticulous examination to make sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion. In other words, have they been judged on merit or has racism or sexism been a factor in the evaluation process? This can be ascertained by establishing effective and credible grievance or complaint procedures to handle allegations of discrimination, review procedures to double-check personnel actions, and examination of practices in an attempt to eliminate non-intentional discriminatory practices. All this is to ensure that the criteria used for hiring or promotion are validated for job-relatedness and did not serve as a mask for racial or gender discrimination. It means that, when it comes to how people are hired or promoted, decision-making has to be colour-blind, and people must be treated on the basis of their individual merits rather than on their status as a member of a particular group. It boils down to the idea that the “best qualified” ought always to be hired.

49. Affirmative mobilization and affirmative fairness both entail measures dedicated to overcoming the social problems of a target group, but the measures do not themselves entail discrimination against people who are not members of that group. Rather, they place the costs of affirmative action on the whole society. In that way, these measures are colour-blind, but when

it comes to the motivation of the measures or their strategic planning or monitoring, the approach is definitely race-conscious. It is probably for that reason, among others, that affirmative recruitment and affirmative fairness are well received and accepted.

3. Affirmative preference

50. Affirmative preference means that someone's gender or race will be taken into account in the granting or withholding of social goods. Affirmative preference measures can mean two things.

51. First, they can mean that when two equally qualified persons apply for a job, promotion, grant, etc., preference will be given to the person belonging to a designated group that is the beneficiary of affirmative action measures.

52. Second, they can also include other more radical measures.[41] It can take the form of prohibiting members of non-designated groups from applying for opportunities. Or, they can be allowed to compete, but even if they are better qualified, preference will still be given to designated groups. Members of designated groups can be automatically given additional points on competitive examinations, which is called "race-norming". Lower standards can be applied to them when evaluating their applications for university or employment. Informal percentages, guidelines, goals, quotas or reservations can be imposed that fix the proportions of social goods the designated groups must receive.[42]

53. Affirmative preference is the most controversial form of affirmative action. Opponents claim that a consequence of this sort of affirmative action is the decline of occupational and professional standards and that it can even lead to stigmatization. Moreover, it emphasizes group remedies as the best way to improve the situation of target groups. This group approach evokes widespread resistance. Entitlement to benefits solely on account of group membership, stresses once more the dilemma that exists, especially in liberal democratic States, of individual versus group rights.[43]

54. In the words of Glazer, "if the whole concept of legal rights has been developed in individual terms, how do we provide justice for the group? And if we provide justice for the group - let us say, a quota which determines that so many jobs must go to the members of the group - then do we not, by that token, deprive individuals of other groups, not included among the discriminated-against groups, of the right to be treated and considered as individuals, independently of group characteristics?"[44] He also believed that such affirmative action would permanently section a nation on the basis of group membership and identification. It confronts the formal arrangement of the individual rights regime by channelling remedies into group categories, thereby disrupting standard notions of individual equality.

55. Many find that this type of affirmative action constitutes discrimination, because it treats people as members of groups or categories without regard to individual merit.[45] Although persons have validly satisfied the criteria, they will be nonetheless denied what would otherwise be their just due. Discrimination takes place through the rationing of social goods, and, this will mean that some members of other groups will no longer be considered for these social goods

which are now only in limited supply. This places the costs of affirmative action on specific individuals. In essence, this kind of affirmative action inflicts an injury on members of group A in order to promote the welfare of members of group B.

56. It creates problems under human rights law, (a) because these injuries are usually imposed in areas of life such as health, education, labour, political participation that are protected by specific articles in the international treaties concerning human rights, and (b) because the criteria for imposing the harms (the basis for classifying people as A or B) are typically the very grounds that are expressly forbidden under non-discrimination provisions. It will thus be very difficult to reconcile demands of legal strategies sensitive to the problems of target groups with the seemingly contradictory demands of individual justice.

57. In the 1997 Report on the World Social Situation, it was maintained that Governments impose quotas or other hard preferences without first building consensus, thus alienating citizens who lose their right to compete on equal terms. Without consensus, quotas become extremely divisive. The Report blames Governments for finding hard preferences attractive because they do not require increased taxation or expenditure. It is much easier to impose quotas than to attack the underlying causes of de facto inequality between groups, including discrimination, poverty, poor education, malnutrition and geographical isolation, through redistribution of income.[46]

58. Some grounds for differences in treatment are recognized in international law as deserving the greatest degree of attention. Particularly classified as suspect, or the most likely to be unjustified, are distinctions based upon race, sex and religion.[47]

59. As such, Judge Tanaka stated in the South West Africa cases: "We consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law."[48] In its Advisory Opinion of 1971 on the Namibia case, the International Court of Justice stated: "To enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[49]

60. In the same line, the European Commission of Human Rights found in East African Asians v. United Kingdom: "The Commission recalls that, as generally recognized, a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question."[50]

61. The case law of the United States Supreme Court cannot be ignored in this respect.[51] Because of the legal uncertainties surrounding affirmative action and the inherent conflict between the affirmative action policy and the Constitutional provisions that adopt a colour-blind approach, the Supreme Court developed extensive case law. The starting point was Plessy v. Ferguson (163 U.S. 537), where, in 1896, the Supreme Court upheld the "separate but equal" doctrine. This was reversed in Brown v. Board of Education (374 U.S. 483) almost 60 years later when, in 1954, the Supreme Court decided that separate schools necessarily

created a feeling of inferiority. Already in 1944, the Supreme Court had decided in Korematsu v. United States that all legal restrictions which curtailed the civil rights of a single racial group were immediately suspect and had to be subjected to the most strict scrutiny.

62. In 1974, the Supreme Court was expected to rule for the first time on affirmative action measures concerning university admittance in DeFunis v. Odegaard (416 U.S. 312). However, as the white student who had been at first denied admittance to the Law Faculty of the University of Washington was only a few weeks from graduating, the case was not decided. In 1978, the justices were deeply divided in Regents of the University of California v. Bakke (438 U.S. 265): with a vote of five against four, it was ruled that, even in the case of an affirmative action programme, strict scrutiny had to be applied. The arguments made for the affirmative action programme had to be looked at, to see if any of them were "compelling" enough to meet the strict scrutiny test.

63. In the following years, the Supreme Court decided a number of cases where affirmative action was accepted, for example: Steelworkers v. Weber (443 U.S 193 (1979)); Fullilove v. Klutznick *(*448 U.S. 448 (1980)); Sheet Metal Workers v. EEOC (478 U.S. 421 (1986)); United States v. Paradise (480 U.S. 149 (1987)); Johnson v. Santa Clara County (480 U.S. 1442 (1987)); Metro Broadcasting Inc. v. FCC (497 U.S. 547 (1990)).

64. In Steelworkers, the Supreme Court accepted the affirmative action programme under which training posts were reserved for African American employees, because the programme was carried out by a private employer and aimed at job categories that had traditionally been segregated. In Sheet Metal Workers, Paradise and Johnson, all three affirmative action programmes were accepted, because their purpose was to remedy intentional discrimination practiced in the past against the African American population by the New York syndicate of metalworkers, the police corps of Alabama and against women in the "skilled craft" job category in Santa Clara county, in the respective cases.

65. Other programmes of affirmative action were struck down by the Supreme Court, as in: Firefighters v. Stotts, (467 U.S. 561 (1984)); Wygant v. Jackson Board of Education, (476 U.S. 267 (1986)); City of Richmond v. Croson (488 U.S. 469 (1989)).

66. The cases of Firefighters and Wygant both concerned the laying off of white workers with more seniority than their African American colleagues, in order to make room for the employment of women or minorities. These affirmative action measures did not stand up to the strict scrutiny test. In Croson, the affirmative action stipulated that 30 per cent of the city's contracts were to be set aside for minority-owned businesses. The Supreme Court deemed that this was not a narrowly tailored plan to overcome past racial discrimination.

67. In 1995, the Supreme Court took an important decision in Adarand Constructors v. Pena (115 St.Ct. 2097). It involved the Adarand Constructors Company, which had lost a contract to a Hispanic-owned construction company even though Adarand had been the lowest bidder, because a federal statute prescribed that 10 per cent of public works contracts were to be set aside for minorities. Writing for a majority of six, Justice O'Connor stipulated that even affirmative action plans created by the federal Government must meet the strict scrutiny test. A compelling purpose must be served and the plan must be narrowly tailored to meet that

compelling purpose. In the justice's view, the past Court decisions established three propositions concerning race-based programmes: (i) scepticism: preferences based on racial or ethnic criteria must necessarily receive a most searching examination; (ii) consistency: the standard of review should not depend on the particular race of the people either burdened or benefited by the plan; (iii) congruence: equal-protection analysis should be the same whether a state or the federal Government was involved.[52]

68. In Abdulaziz, Cabales and Balkandali, the European Court decided: "it can be said that the advancement of the equality of the sexes is today a very major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention".[53] Yet, it would be wrong to conclude that those weighty reasons for justifying gender discrimination have always been consistently required.[54]

69. It is significant that, in its case law, the United States Supreme Court applies the lower standard of "intermediate scrutiny" to affirmative actions aimed at remedying gender discrimination. It was ruled that the Government could discriminate on the basis of sex if it had important objectives and the measures taken by the Government were substantially related to achieving those objectives. It was clear that "important" would be something less than "compelling" and that the measures would not have to be as "narrowly tailored" as required by the strict-scrutiny test.

70. European Community (EC) law, however, is particularly active in countering gender discrimination, acknowledging equal treatment between men and women as a fundamental right. EC law has recognized that to achieve equality of opportunity between women and men it is necessary to go beyond the eradication of discrimination and that affirmative action may be appropriate even where it results in the preferential treatment of the formerly disadvantaged group.[55] However, it was up to the Court of Justice to determine how far national affirmative action policies could go.[56]

71. In Kalanke v. Freie Hansestadt Bremen, the Court affirmed that article 2 (4) of the Equal Treatment Directive permits the enactment of measures which, although discriminatory in appearance, are designed to eliminate or reduce actual instances of inequality which may exist in the reality of social life, and hence improve women's ability to compete on the labour market and to pursue a career on an equal footing with men.[57] As a derogation from an individual right laid down in the Directive, that provision must be strictly interpreted: it could not therefore be understood as legitimizing national rules which guarantee women absolute and unconditional priority for appointment or promotion, since such measures go beyond the furtherance of equal opportunities and overstep the limits of article 2 (4). The City of Bremen operated a tiebreak provision, on finding that two candidates for a job possessed the same qualifications, gave automatic preference to the female candidate when there was under-representation of one sex. Under-representation of women was deemed to exist when women did not make up at least half of the staff in the individual pay bracket in the relevant personnel group in the department or at the function levels provided for in the organization chart. The provision was found to be incompatible with EC law, although the Court was explicit in the Kalanke case that positive

action could be used to improve the opportunities of women, having gradual and systematic effects, but it must not be used to achieve equality by bringing about immediate substantive equality.

72. In Marshall v. Land Nordrhein-Westfalen, the Court of Justice refined its case law.[58] It decided that, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, a national rule which requires that priority be given to the promotion of female candidates, unless reasons specific to an individual male candidate tilt the balance in his favour, is not precluded by the Equal Treatment Directive, provided that: (a) in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate; and (b) such criteria are not such as to discriminate against the female candidates. It seems that the so-called Öffnungsklausel, which does not give automatic preference to female candidates, but permits diversion from this preference when "reasons specific to an individual male candidate tilt the balance in his favour", made the difference in Kalanke.[59]

73. Whatever the case may be, it is clear from the international and national case law discussed above that the relationship between affirmative action and the non-discrimination principle is very stringent. The simple fact that a particular category of the population suffers from underprivileged economic or social conditions does not mean that, in order to upgrade its material position, any distinction based on a characteristic defining the group should be considered legitimate, even if the ground is irrelevant as a basis of distinction with regard to a particular right. It would be most unwarranted to award affirmative action measures to persons who in essence do not need them, but used to belong to a group which formerly was in a disadvantaged position, and to deny them to persons who do need them, but used to belong to a group who formerly held a well-to-do position in society.

74. Affirmative action must concentrate on taking measures which can be expected to fulfil the needs of persons belonging to a group requiring special protection. It is through the choice of measures and of the moment and place at which they will be activated that the State can give benefits to targeted groups, without thereby excluding from the benefits others who do not belong to these targeted groups. In no case may someone be robbed of his rights, including the right to equal protection of the law, with the excuse that this could help groups that were previously discriminated against.

75. Affirmative action policies are only admissible insofar as they do not contravene the principle of non-discrimination. This means that if a distinction is made, due attention should be given to the ground on which the distinction is based in deciding whether this distinction amounts to discrimination or not. However, it is not the ground itself that is decisive, but the connection between the ground and the right in which the distinction is practised. There has to be a sufficient connection between the right and the ground. The ground has to be deemed relevant for the specific right in which the distinction is based. The aim or goal pursued is not decisive. The judicial assessment of whether distinctions are arbitrary goes a step further than

assessment undertaken at a purely political level. Thus, affirmative action to ensure full equality is not always legitimate. Affirmative action should not be interpreted as justifying any distinction based on any ground with respect to any right merely because the object of the distinction is to improve the situation of disadvantaged individuals or groups. It is not the preference but the injury and the use of forbidden classifications as a basis for imposing the injury that are sanctioned. Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action.

4. Is affirmative action mandatory?

76. Some international doctrine and jurisprudence suggest that, when a State ratifies a human rights treaty, it agrees to take positive State action to "ensure" enjoyment of, or to take steps to achieve "full realization" of, the rights recognized in that treaty, as is the case with the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.[60]

77. The Human Rights Committee has made a number of statements in its General Comments with respect to the necessity of positive government action.[61] It has often remarked that this cannot be done by simply enacting law and has asked State parties to provide information in their subsequent reports concerning the measures they have taken or are taking to give effect to the precise and positive obligations under article 3 of the International Covenant on Civil and Political Rights.[62]

78. The Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights have both adopted several general recommendations which indicate their view that the respective Conventions impose positive state action for achieving equality.[63] However to state that international law impose a duty to take affirmative action is too extreme. What it does promote is the possibility of taking affirmative action to achieve de facto equality.

79. The Committee on the Elimination of Discrimination against Women reiterated the importance of this possibility in its General Recommendation No. 5:

> "Taking note … that there is still a need for action to be taken to implement fully the convention by introducing measures to promote de facto equality between men and women … Recommends that States parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment."[64]

80. The Human Rights Committee has interpreted the International Covenant on Civil and Political Rights as requiring affirmative action programmes in certain circumstances. In its General Comment on non-discrimination the Committee points out that: "… the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific

action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population".[65]

81. The Committee on Economic, Social and Cultural Rights has raised a number of questions concerning affirmative action, especially as regards people with physical disabilities and ethnic or racial minorities, and in doing so, Craven maintains, it seems to accept the legitimacy of affirmative action. However, it still has not explicitly recognized the obligatory nature of affirmative action.[66]

82. Yet, some commentators have argued that States are indeed obliged to take affirmative action for the benefit of disadvantaged groups.[67] They base their arguments on the theory of "effet utile". The rights contained in the human rights treaties have to be given appropriate and full effect, and in some cases affirmative action is the most appropriate technique to ensure this.[68] Those commentators also base themselves on case law developed by the European Court of Human Rights, which has found that in some circumstances passivity on the part of the State will not be sufficient, but there will be positive obligations inherent in an effective respect for the rights inscribed in the Convention. The Marckx case, especially, seems to strengthen them in their belief that positive State action, and in certain cases affirmative action, is sometimes required of the State in order for it to fulfil its duty to respect equality.[69]

5. Equality of opportunities versus equality of results

83. It is clear that the main goal of affirmative action is to establish a more egalitarian society. However, there are many competing and conflicting ideals of equality. Equality itself is essentially an undetermined category that is often filled in by policy makers.

84. Two ideals of equality that are particularly relevant to affirmative action are equality of opportunity and equality of results. The choice of an ideal will also determine which affirmative action programmes are desired or favoured and which vision of social justice society wants to implement.[70]

85. Equality of opportunity is consistent with the view that the aim of anti-discrimination law is to secure the reduction of discrimination by eliminating/cleansing from the decision-making processes illegitimate considerations based on race, gender or ethnicity which have harmful consequences for individuals. It is not concerned with the result, except as an indicator of a flawed process. This approach is also markedly individualistic, concentrating on securing fairness for the individual. It comes from a liberal vision of society, reflecting respect for efficiency, merit and achievement.

86. This view of equality is seen as "manageable" in that its aim can be stated with some degree of certainty. For example, in an employment context, it means that individuals are entitled to compete for jobs exclusively on the basis of characteristics needed for the satisfactory performance of those jobs. The proposition is that racial, sexual and ethnic characteristics are irrelevant to the way people should be treated. Thus persons should be selected and recruited without regard to race, gender, ethnic background, etc. Equality of opportunity promotes freedom of choice and free competition between individuals. Therefore, it allows social

mobility, up or down, in accordance with people's individual talents and skills. The affirmative action measures that will be consistent with the ideal of equality of opportunity, will, not surprisingly, involve measures aimed at skill-building and gender- and colour-blind decision-making (affirmative recruitment and affirmative preference).

87. However, although equality of opportunity will bring everyone to the same starting line, it has been criticized as deeply flawed. This approach is said to misconceive the deep structure of discrimination. More precisely, affirmative recruitment and affirmative preference, also called soft affirmative action, will require a comparatively long time to produce a social order free of traces of past or structural discrimination.[71] Race and sex discrimination are as often institutional as individual and the problem is misconceived as being one of intention rather than effect. It does not take adequately into account the surrounding and reinforcing nature of racial or gender disadvantage, and concentrates only on particular action in assessing whether there should be legal intervention, ignoring the wider picture.

88. Critics of equality of opportunity find that the aim should be to fix the outcomes of the decision-making processes. They argue that the basic aim is the improvement of the relative position of disadvantaged groups. This approach tends to be concerned with the relative position of groups or classes, rather than individuals. Equality cannot depend on individual performance.

89. Where equality of opportunity maintains that talents and skills are not distributed uniformly throughout the human race, equality of results states paramountly that skills and talents are distributed uniformly. Men, women, whites and ethnic minorities have on average the same talents and skills. Thus, implementing the ideal of equality of opportunity would be expected to result in equal outcomes, in the sense that men, women, whites and ethnic minorities would be represented in positions of influence and power in proportion to their total strength in society. Following that reasoning, this means that any large disparities in result must therefore necessarily be due to the existence of a system or structure of discrimination which is the result of certain practices.

90. Affirmative action consistent with the ideal of equality of results will here imply measures of affirmative preference, and, more specifically, hard affirmative action measures, such as quotas, reservations, goals, etc. The achievement of equality of results requires measures that lead inevitably to proportional representation of groups in, for example, the workforce, education and public housing. Social goods are distributed precisely on the basis of race, gender, ethnic background, etc. Some proponents also point out that affirmative action has to be seen in the context of economic, social and cultural rights, which implies political State action which is aimed at adopting special measures to improve the situation of socio-legal categories in certain domains.[72]

91. The ideal of equality of results is more controversial because of its methods, which are open-ended and unmanageable, such as the adoption of quotas. Quotas are often criticized for serving to disadvantage other vulnerable groups that have similar claims to equality, for contributing to hostility and resentment between social groups and for failing to take into account the fundamental element of individual choice. This results in the displacement or rejection of those who, under traditional criteria, would have been allocated a social good.

92. But should individuals be asked to make sacrifices to compensate some members of target groups? As stated before, reverse discrimination is absolutely to be avoided. As McCrudden points out, this approach is said to take insufficient account of the extent to which the burden of helping disadvantaged groups falls on third parties who may be "innocent" of past wrong-doing, who may have gained no benefit from discrimination against these groups in the past and who comprise some of the least advantaged sections of the community in terms of their economic circumstances.[73]

93. It is interesting to note that most countries started out with an affirmative action programme consistent with the ideal of equality of opportunity. However, this ideal was gradually replaced by that of equality of results, under pressure of political or social motives.[74] Often, the two ideals are confused, and the legislation does not make clear which ideal of equality it wants to see implemented.

94. Nevertheless, it is clear that the issue is not simply whether one is for or against affirmative action for a particular group. The method by which the betterment of their position is attempted matters greatly in terms of whether such efforts have the support or the opposition of others.[75] A last remark: affirmative action programmes do not substitute for anti-poverty programmes. Nor do they substitute for laws against discrimination, for they provide no benefits for groups such as Chinese or Jewish minorities, which suffer discrimination in many countries but are not, on average, disadvantaged.[76]

Notes

[1] For instance, in the United States the "protected" groups that were to benefit from affirmative action were identified as follows: American Indians or Alaskan Natives: persons having origins in any of the original people of North America and who maintain cultural identification through tribal affiliation or community recognition; Asian or Pacific Islanders: persons having origins in any of the original peoples of the Far East, South-East Asia, South Asia or the Pacific Islands; Blacks: persons having origins in any of the black racial groups of Africa; Hispanics: persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. In South Africa, the designated groups are Black people (African people), people classified as "Coloureds" and Indian South Africans, women and people with disabilities. For more on the question of racial identity in South Africa, see P.E. Andrews, "Affirmative action in South Africa: transformation or tokenism", Law in Context, 1999, pp. 91-93.

[2] See M.O. Chibundu, "Affirmative action and international law", Law in Context, 1999, p. 21.

[3] In India, the Scheduled Castes and Tribes, which account for 20 per cent of the entire Indian population, are given special rights. Another group, the so-called socially and educationally backward classes, also benefits from affirmative action measures. Unlike the Scheduled Castes and Tribes, they have never been a clearly defined category. Their identity, therefore, is strongly disputed and thus frequently subject to review. Several groups have tried to qualify for these rights, to the point where two national Backward Classes Commissions were set up, in 1953 and 1979 respectively. They had a mandate to draft lists of groups to be considered for affirmative action. Although India inscribed affirmative action in its Constitution with the

purpose of eliminating the caste system, affirmative action for backward classes has actually provided for a revival of the caste system. In the end, the lists are nothing more than a continuous selection of castes, only limited by a decision of an Indian state court that backward classes cannot include more than 50 per cent of the population. See F. de Zwart, "Positieve discriminatie and identiteitpolitiek in India: grenzen aan sociale constructies", Tijdschrift voor beleid, politiek en maatschappij, 199, No. 4, pp. 262-274; W.F. Menski, "The Indian experience and its lessons for Britain", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 300-343; O. Mendelsohn, "Compensatory discrimination and India's untouchables", Law in Context, 1999, vol. 15, No. 4, pp. 51-79; D.W. Jackson, "Affirmative action in comparative perspective: India and the United States", in T. Loenen and P.R. Rodrigues, Non-discrimination Laws: Comparative Perspectives, The Hague, Kluwer Law International, 1999, pp. 249-263.

[4] G. Moens, Affirmative Action, the New Discrimination, Sydney, The Centre for Independent Studies, 1985, pp. 81-82.

[5] L. Newton, "Reverse discrimination as unjustified", International Journal of Ethics, 1973, vol. 83, pp. 311-312.

[6] See C. Hamilton, "Affirmative action and the clash of experimental realities", The Annals, 1992, vol. 523, pp. 10-18. The clashing experiences of African Americans and immigrants also produce different political demands and attitudes towards what is owed by the society.

[7] N. Glazer, Affirmative Discrimination: Ethnic Inequality and Policy, New York, Basic Books Inc. Publishers, 1978, pp. 198-200.

[8] G. Moens, op. cit., pp. 82-83, quotes Sowell as follows: "It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a DeFunis or a Bakke. Even aside from personal influence on admissions decisions, the rich can give their children the kind of private schooling that will virtually assure them test scores far above the cut-off level at which sacrifices are made. Just as the students who are sacrificed are likely to come from the bottom of the white distribution, so the minority students chosen are likely to be from the top of the minority distribution. In short, it is a forced transfer of benefits from those least able to afford it to those least in need of it."

[9] For example, the person with a Spanish-surnamed mother who finds it advantageous to change his name, as in the United States affirmative action measures also apply to Spanish-surnamed Americans. N. Glazer, op. cit., p. 200.

The Indian Commission of 1953, which was established to make up a list of the backward classes to benefit from affirmative action, was confronted with the problem of high-placed castes giving up their status and position "lest they should lose the State help". F. de Zwart, loc. cit., p. 268.

[10] See HRI/Gen/1/Rev.1, (1994), Part III.

[11] In Malaysia, the Chinese and Indian poor who work in rural areas as farmers, rubber tappers or miners and in urban areas as menial workers are as much exploited as their Malaysian counterparts. They are all victims of inter-racial as well as intra-racial exploitation. According to Philips, "exploitation is a matter of class and power as well as race, a matter of economics as much as ethnicity". Although Malays benefit from affirmative action, this has done more for the Malay and non-Malay upper classes. Therefore, Philips argues for effective targeting based upon a combination of class and location, rather than on ethnic groupings. E. Philips, "Positive discrimination in Malaysia: a cautionary tale for the United Kingdom", in B. Hepple, and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 352-353.

[12] For a general overview, see G. Pitt, "Can reverse discrimination be justified?", in B. Hepple, and E. Szyszczak, op. cit., pp. 281-299; C. McCrudden, "Rethinking positive action", Industrial Law Journal, 1986, vol. 15, pp. 219-243.

[13] M.O. Chibundu, loc. cit., pp. 18-19.

[14] For example, an affirmative action plan may provide that an employer hires a certain percentage of new minority employees to a certain timetable. While the employer may have discriminated against, say, African Americans in the past, new African Americans hires who have never before applied for a job with the employer need not have been personally the victims of the employer's past discriminatory practices in order to benefit.

[15] In the words of President Lyndon Johnson, speaking about the aim of affirmative action programmes: "You do not wipe away the scars of centuries by saying: 'Now you are free to go where you want, and do as you desire'… You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all the others', and still justly believe that you have been completely fair … We seek … not just equality as a right and a theory but equality as a fact and equality as a result." Excerpt from President Johnson's speech to graduates at Howard University, June 1965, as quoted in S.M. Cahn, (ed.), The Affirmative Action Debate, London, Routledge, 1995, p. xii.

[16] United States Commission on Civil Rights, Statement on affirmative action, October 1977, p. 2, as quoted in W.L. Taylor, and S.M. Liss, "Affirmative action in the 1990s: staying the course", The Annals, 1992, vol. 523, p. 31.

[17] T. Sowell, Preferential Policies, an International Perspective, New York, William Morrow and Company Inc., pp. 148-150. Nathan Glazer (op. cit. p. 201) contends that compensation for the past is a dangerous principle. It can be extended indefinitely and make for endless trouble.

[18] M.O. Chibundu, loc. cit., pp. 18-19.

[19] Ibid., p. 34. See also B. Parekh "A case for positive discrimination", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 265-268: "A divided past cannot permit a shared present and a shared future unless the present generation finds ways of pacifying its aggrieved and tormented victims."

[20] The United States Supreme Court and the European Court of Justice have developed case law which successfully addresses indirect discrimination. In Griggs v. Duke Power Co. (401 U.S. 424, 1971) the theory of adverse or disparate impact was created which holds employers liable for the diverse effect of unjustified employment practices, regardless of the employer's particular intent. The Duke Power Co. was located in North Carolina, a southern state with a long history of segregated and deficient education for African Americans. As a result of its educational policies, a far greater number of African Americans than whites did not possess high school diplomas and were thus ineligible for many of the preferred jobs. The plaintiffs did not claim that the company intended to discriminate against African Americans, and instead rested their claim on the effect of the practices. In a unanimous and short decision, the United States Supreme Court held that the policy could be challenged under title VII of the Civil Rights Act of 1964 based on the effects of the practices. The Court explained: "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question". However, the Supreme Court restricted the "disparate effect" theory in Wards Cove Packing Co. v. Antonio (490 U.S. 642, 1989), which made it more difficult to prove claims of indirect discrimination by rendering it easier for businesses to justify policies that had a disparate impact. Yet, in 1991, a Civil Rights Act was passed which for the first time explicitly included the disparate impact theory safely within the scope of title VII of the Civil Rights Act of 1964.

The Court of Justice of Luxembourg referred to the Griggs case in its landmark decision Bilka Kaufhaus v. Weber von Hartz (CJ 13 May 1986, case 170/84, ECR 1986, 1607). The case concerned the exclusion of part-time workers from the pension scheme of a large department store. Mrs. Weber challenged this exclusionary practice on the basis of the right to equal pay as enshrined in European Community law. Though the policy in itself is gender neutral, it adversely affects women much more than men, as the greater number of part-time workers are female. The Court held that the right to equal pay "is infringed by a department store company which excludes part-time workers from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex". The Court further qualified that this requirement of "objective justification" by demanding that the measure or practice meet a "real need of the enterprise" and be "appropriate and necessary" to that end. In later cases this test was applied in the same way to indirect discrimination by the State, e.g. through discriminatory legislation, the "real need" requirement being replaced by the more general demand of a "legitimate aim". In short, establishing indirect discrimination takes two steps: showing an adverse effect/disparate impact upon a specific group and showing that there is no objective justification available. Proof of direct discrimination is determined by comparison of individuals, whereas proof of indirect discrimination involves a comparison between groups. See more in T. Loenen, "Indirect discrimination: oscillating between containment and revolution", in T. Loenen and P.R. Rodrigues, (eds), Non-discrimination Law: Comparative Perspectives, The Hague, Kluwer Law International, 1999, pp. 195-211; M. Selmi, "Indirect discrimination: a perspective from the United States", in T. Loenen and P.R. Rodrigues, (eds), op. cit., pp. 213-222; B. Vizkelety, "Adverse effect discrimination in

Canada: crossing the Rubicon from formal to substantive equality", in op. cit., pp. 223-236. I. Sjerps, "Effects and justifications. Or how to establish a prima facie case of indirect sex discrimination", in op. cit., pp. 237-263.

The most important human rights texts on discrimination, the ILO Discrimination (Employment and Occupation) Convention of 1958, the UNESCO Convention against Discrimination in Education of 1960, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, forbid discrimination defined as an act that has a discriminatory "purpose" or "effect".

Thus it is made quite clear that "intention" is not a necessary condition for establishing discrimination. The reference to "effect" makes it redundant to prove a discriminatory intent or "purpose", and indicates that indirect discrimination is also forbidden under human rights law. In his dissenting opinion in the South West Africa case, Judge Tanaka stated: "The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to … motive or purpose" (Dissenting Opinion of Judge Tanaka, South West Africa, (2nd phase), Judgement of 18 July 1966, I.C.J. Report, 1966, p. 306).

The same belief is also held with regard to article 2 of the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The Human Rights Committee defines "discrimination" in its General Comment 18 as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". (HRI/Gen/1/Rev.1, Part I, Human Rights Committee, General Comment 18, para. 7.) This definition is reflected in the Committee's case law, although somewhat inconsistently. For example, its views in K. Singh Bhinder v. Canada indicate that obvious instances of indirect discrimination will breach the International Covenant on Civil and Political Rights (A/45/40, vol. II, annex IX. sect. E, Communication No. 208/1986). Finally, the Committee on the Elimination of Racial Discrimination states: "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin." (HRI/GEN/1/Rev.1, Part III, Committee on the Elimination of Racial Discrimination, General Recommendation XIV on article 1 of the Convention, para. 2.) See also Lord Lester of Herne Hill and S. Joseph, "Obligations of non-discrimination", in D. Harris and S. Joseph, The International Covenant on Civil and Political Rights and the United Kingdom Law, Oxford, Clarendon Press, pp. 575-576 and A.F. Bayefsky, "The principle of equality or non-discrimination in international law", Human Rights Law Journal, 1990, pp. 8-10.

[21] See, for more, T.L. Banks, "Equality, affirmative action and diversity in the United States", C.R. Lawrence and M.J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action, Boston, Houghton Mifflin Company, 1997.

[22] In this case the Supreme Court refused to address directly whether racial preferences are permissible, ruling instead that the matter was moot since the petitioner, Marco DeFunis, would complete his legal education even if he lost.

[23] The diversity concept has lately been attacked in several federal courts. The validity of diversity as a goal was questioned by a federal appellate court in Hopwood v. Texas (78 F 3d 932, 5th Cir 1996, cert denied, 135 L Ed 1094, 1997). The court reasoned that racial diversity in higher education is not a compelling governmental interest and is inconsistent with the concept of colour-blind or merit-based admissions criteria. See also Podberesky v. Kirwan (38 F 3d 52, 4th Cir 1994, cert denied, 131 L Ed 1002, 1995), S. Thernstrom, "The scandal of the law schools", Commentary, December 1997, pp. 27-31. Moreover, in 1996 the University of California Board of Regents voted to prohibit the use of race, religion, sex, colour, ethnicity or national origin in admission, employment or contracting decisions at the University of California's nine public campuses. See also California's Proposition 209, forbidding racial preferences in higher education. See also scholars with an opposite opinion, who claim that the use of racial preferences in higher education is not at all effective and amounts in most cases to a flagrant double standard. Letting minority students earn their positions through their own merit would make for a healthier racial climate. Besides, they feel that the discussion on preferences in higher education has deflected attention from the real problem: the yawning racial gap in educational performance among elementary and secondary school pupils. As long as this gap exists, efforts to engineer parity in college are, according to them, doomed to fail. Another problem is that it has not been agreed upon how much "diversity" is enough and how much harm may be inflicted upon other individuals. S. Thernstrom and A. Thernstrom, "Racial preferences: what we now know", Commentary, February 1999, pp. 44-50.

[24] G. Moens, op. cit., pp. 30-31.

[25] See more in K. Greenawalt, Discrimination and Reverse Discrimination, New York, Borzoi Books in Law and American Society, 1983, pp. 52-70; R.K. Fullinwider, The Reverse Discrimination Controversy, a Moral and Legal Analysis, New Jersey, Rowman and Littlefield, 1980, pp. 18-29; and I. Glasser, "Affirmative action and the legacy of racial injustice", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988.

[26] See M.O. Chibundu, loc. cit., pp. 31-32. See also a paper prepared by F. de Varennes, "Minority rights and the prevention of ethnic conflicts" (E/CN.4/Sub.2/AC.5/2000/CRP.3).

[27] As quoted in J.D. Skrentny, The Ironies of Affirmative Action, Chicago, The University of Chicago Press, 1996, p. 113.

[28] T. Sowell, op.cit., pp. 153-156.

[29] In Fan Yew Teng v. Public Prosecutor, the Federal Court upheld a conviction for seditious publication of an article, which criticized the Government for alleged partiality towards Malays. The court held that "these provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of the circumstances prevailing in the country at the time of

independence". As quoted in E. Philips, "Positive discrimination in Malaysia: a cautionary tale for the United Kingdom", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, p. 352.

[30] See P.A. Samuelson, Economics, New York, McGraw-Hill Book Company, 1970, pp. 780-794.

[31] See M. Triest, "Positieve actie en arbeidsmarkt", in de Graeve and others, Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Antwerpen, Kluwer, 1990, p. 19.

[32] See G.C. Loury, "Incentive effects of affirmative action", The Annals, 1992, vol. 523, pp. 19-29; W.B. Reynolds, "Affirmative action and its negative repercussions", The Annals, op. cit., pp. 38-49.

[33] E. Philips, op. cit, pp. 344-356.

[34] See J.G. Kellas, The politics of Nationalism and Ethnicity, London, McMillan, 1991, p.125.

[35] P.E. Andrews, "Affirmative action in South Africa: transformation or tokenism?", Law in Context, 1999, pp. 80-81.

[36] See Ncholo's observations in "Equality and affirmative action in constitution-making: the Southern African case", in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, pp. 412-432.

[37] "Affirmative action in South Africa has nothing to do with creating opportunities for a minority. Rather, it means transforming an economy that once barred 75 per cent of the population from any meaningful role." (quoted in P.E. Andrews, loc. cit., p. 82)

[38] J. Hodges-Aeberhard and C. Raskin Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities, Geneva, International Labour Office. They documented their study with eight case studies on Canada, India, Lebanon, Malaysia, Norway, the Philippines, the Russian Federation and Uganda.

[39] Alison Sheridan has developed a classification system that illustrates the broad range of this type of "affirmative mobilization" measures in the specific context of combating sex discrimination and disadvantage in employment. She identifies four kinds of affirmative action strategies: (i) temperamental policies address those differences in women's personality traits, characters, attitudes, social skills and habits ("deficiencies") that often impede the advancement of women (e.g. seminars are held on gender communication and image-building, networking among women is promoted), (ii) role-related policies tackle the dichotomies and role dilemmas women experience in dealing with work and family issues, more particularly: (iii) (a) work and family policies to help women combine income-generation and home-maker roles (e.g. child care, flexible working hours, increasing opportunities for part-time work, training takes place within working hours, rules for maternity leave are made more generous, "family-friendly" clauses are put into union contracts, job-sharing), and (iii) (b) non-traditional job policies to

expand option for women (e.g. women are attracted into seagoing careers through large posters showing females working on ships, an apprenticeship brochure is written to encourage girls to apply, personnel officers encourage girls to go into engineering), (iv) social structural policies aimed at overcoming bias and exclusionary practices - the category with the largest array of measures (e.g. a formal policy on sexual harassment is adopted and publicized by posters, a scholarship programme is reviewed to ensure that merit is the primary consideration, all vacancies are first advertised internally, staff are trained to avoid sex bias, women are actively encouraged to apply for positions that have previously been occupied only by men) and (v) opportunities policies assist employees who want to move ahead (e.g. career counselling is continuously made available, career development courses are liberally provided, women are encouraged to participate in workplace committees, secretarial staff are offered technical and professional skill-building programmes). Some of these strategies can be transposed and used to overcome racial disadvantage in the workplace. A. Sheridan, "Patterns in the policies: affirmative action in Australia", Women in Management Review, 1998, pp. 243-252.

[40] Section 35 of the United Kingdom Race Relations Act renders lawful "any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits". Section 37 states that positive action may be taken to encourage members of a racial group, or members of one sex, to apply for, or be specially trained for, work in which they have been underrepresented.

[41] This is especially the case in the United States, where the implementation of Executive Order 11246 was left up to the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Committee (EEOC). They interpreted affirmative action as a set of specific and result-oriented procedures, making use of timetables and goals. Under President Nixon, affirmative action came to mean the setting of statistical requirements based on race, colour, and national origin for employers and educational institutions. The various federal departments created the first major "quota" plans. These quota plans are very controversial, and have been the subject of extensive case law. Yet, the acceptance of quotas and reservations will depend on the specific situation in which they will apply. For instance, most Americans seem to accept the use to correct instances of specific historic discrimination. Even conservative persons accept the idea of court-ordered quotas when past discrimination has been proven in a court of law.

[42] Quotas are objectives of personnel representation within a company or institution which are quantified and which have to be achieved within a precisely described time period. These quotas are imposed by the State or by court order. It can be that companies or institutions are ordered to make sure that within five years 10 per cent of their personnel are women. It can be that companies or institutions have to be sure that for every four men that are employed, one woman is contracted. Quotas have the discriminatory intent of restricting a specified group from a particular activity. Goals, on the other hand, are numerical target aims which a company or institution tries to achieve; formulated otherwise, only a "good faith effort" to reach them is required.

The aim is not discriminatory but affirmative in intent: to help increase the number of qualified members of a disadvantaged group in the company or institution. Yet often, in practice, goals will operate as quotas, by putting the burden on the employer to rebut the presumption of discrimination. See N. Glazer, "The future of preferential affirmative action", in P.A. Katz and D.A. Taylor, Eliminating Racism, Profiles in Controversy, New York, Plenum Press, 1988, pp. 329-339.

[43] See for a discussion on this issue, R.T. Bron, Affirmative Action at Work. Law, Politics and Ethics, Pittsburgh, University of Pittsburgh Press, 1991, pp. 37-59; J. Edwards, "Collective rights in the liberal state", Netherlands Quarterly of Human Rights, 1999, pp. 259-275.

[44] As quoted in G, Moens, op. cit. p.12.

[45] See S.M. Lipset "Equal chances versus equal results", The Annals, 1992, vol. 523, pp. 63-74. The United States dilemma remains how best to resolve the contradiction between the United States egalitarian creed and the legacy of slavery.

[46] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation 1997, (E/1997/15), paras. 105-106.

[47] Bayefsky submits that religion has also become an internationally suspect category, yet others doubt this submission. See Lord Lester of Horne Hill and S. Joseph, op. cit., p. 590. Baer points out that there is a distressing tendency on the part of some members of the United States Supreme Court to reason rigidly within categories established by earlier decisions, most notably that "race is inherently a suspect classification", i.e., any racial discrimination can survive only with "strict scrutiny". J.A. Baer, "Reverse discrimination, the dangers of hardened categories", Law and Policy Quarterly, 1982, pp. 71-94.

[48] South West Africa Cases, Second Phase, I.C.J. Reports, 18 July 1966, para. 293.

[49] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970), Advisory Opinion, 1971, I.C.J. Reports 3, para. 57. See also Barcelona Traction, Light and Power Co., I.C.J. Reports, 1970, paras. 33-34.

[50] European Commission of Human Rights, East African Asians v. United Kingdom, 14 December 1973, appl. 4403/70, para. 270.

[51] For literature, see: O. de Schutter, "Égalité et différence: le débat constitutionnel sur la discrimination positive aux Etats-Unis", Revue Trimestrielle des Droits de l'Homme, pp. 347-368, the issue of The Annals, 1992, vol. 523 on "Affirmative action revisited". The following statement of the United States Commission on Civil Rights in 1984 is also important: "Simple justice is not served, however, by preferring non victims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative

action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens." G. Moens, op. cit., pp. 30-31.

[52] The recent effort in California through Proposition 209, to forbid racial preferences in higher education, is, according to Paust, inconsistent with the provisions of international treaties, such as ICCPR and ICERD, and superior federal policy set forth in these treaties, and cannot prevail. Under the Supremacy Clause, California must yield to the permissibility of affirmative action assured in international treaty law of the United States. This does not guarantee that particular measures of affirmative action will survive all constitutional challenges, but the propriety of affirmative action under international treaty law of the United States and related duties provide compelling State interests and can contribute to a continuing or evolving meaning of the Constitution compatible with generally shared values and human dignity. J.J. Paust, "Race-based affirmative action and international law", Michigan Journal of International Law, 1997, vol. 18, pp. 674-677.

[53] Abdulaziz, Cabales and Balkandali v. United Kingdom, European Court of Human Rights, 18 December 1986, Ser. A, No. 112, para. 80.

[54] See more in A.F. Bayefsky, loc. cit., pp. 22-24.

[55] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Article 2, para. 4: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in areas referred to in Article 1, para. 1." In 1984, this directive was complemented with a Council Recommendation of 13 December 1984 on the promotion of positive action for women. This recommendation was motivated by the following consideration: "… legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by Governments, both sides of industry and other bodies concerned to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures", and recommends Member States "to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry."

[56] See more in: E. Szyszczak, "Positive action after Kalanke", Modern Law Review, 1996, pp. 876-883; G.F. Mancini, S. O'Leary, "The new frontiers of sex equality law in the European Union", European Law Review, 1999, pp. 331-353. E. Ellis, "Recent developments in European Community sex equality law", Common Market Law Review, 1998, pp. 404-406. C. McCrudden, "The legal approach to equal opportunities in Europe: past, present and future", International Journal of Discrimination and the Law, 1998, pp. 200-201. A.G. Veldman,

"Preferential treatment in European Community law: current legal developments and the impact on national practices", in T. Loenen and P.R. Rodrigues, Non-discrimination laws: comparative perspectives, The Hague, Kluwer Law International, 1999, pp. 279-291.

For articles in relation to national legislation see V. Sacks, "Tackling discrimination positively in Britain" and J. Shaw, "Positive action for women in Germany", both in B. Hepple and E. Szyszczak, Discrimination: the Limits of the Law, London, Mansell, 1992, respectively pp. 357-385 and pp. 386-411.

[57] C-450/93, Kalanke v. Bremen, 17 October 1995, E.C.R. I-3051.

[58] C-409/95, Marshall v. Land Nordrhein-Westfalen, 11 November 1997, E.C.R. I-6363.

[59] It is interesting that various Governments submitted written observations in defence of the national rule.

[60] Article 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination states: "State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved".

Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women states: "State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men."

[61] See, for example, Human Rights Committee, General Comment 4 on article 3, (see HRI/GEN/1/Rev.1, Part I) (1994), para. 2: "Firstly, article 3, or articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights."

[62] Ibid.

[63] For example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 8 on implementation of article 8 of the Convention (see HRI/GEN/1/Rev.1, Part IV) (1994): "Recommends that States parties take further direct measures in accordance with article 4 of the Convention to ensure the full implementation of article 8 of the Convention and to ensure to women on equal terms with men and without any discrimination the opportunities to represent their Government at the international level and to

participate in the work of international organizations." Committee on Economic, Social and Cultural Rights, General Comment No. 5 on persons with disabilities (see E/C.12/1994/13) para. 9: "The obligation of States parties to the Covenant to promote progressive realization of the relevant right to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities."

[64] Committee on the Elimination of Discrimination against Women, General Recommendation No. 5 on temporary special measures (see HRI/GEN/1/Rev.1. Part IV).

[65] Human Rights Committee, General Comment 18 on non-discrimination (see HRI/GEN/1/Rev.1, Part I, (1994), para. 10.

[66] M. Craven, The International Covenant on Economic, Social and Cultural Rights, a Perspective on its Development, Oxford, Clarendon Press, 1995, p. 186.

[67] B.G. Ramcharan, op. cit. p. 261; A. Bayefsky, loc. cit., pp. 27-33; E. Vogel-Polsky. Les actions positives et les contraintes constitutionelles et legislatives qui pèsent sur leur mise en œuvre dans les Etats Membres du Conseil de l'Europe, Comitè europeèn pour l'ègalitè entre les femmes et les hommes, Strasbourg, 27-29 avril 1992, CEEG, (87), 14, 11.

[68] E. Vogel-Polsky, "Les actions positives dans la thèorie juridique contemporaine", in B. de Grave, (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahier 8, Antwerpen, Kluwer, 1990, p. 79.

[69] European Court of Human Rights, Marckx v. Belgium, 13 June 1978, vol. 31, Ser. A., para. 31.

[70] See for a discussion M.B. Abram, "Affirmative action: fair shakers and social engineers", in C. McCrudden, (ed.), Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. 499-513; S. Fredman, "Reversing discrimination", The Law Quarterly Review, 1997, pp. 575-600.

[71] G. Moens, op. cit. p. 11.

[72] E. Vogel-Polsky, "Les actions positives dans la thèorie juridique contemporaine", in B. de Grave (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahir 8, Antwerpen, Kluwer, 1990, pp. 75-77.

[73] For a summary of all the arguments for and against equality of opportunity and equality of results, see C. McCrudden, Anti-discrimination Law, Dartmouth, The International Library of Essays in Law and Legal Theory, 1991, pp. xvi-xviii.

[74] See, for instance, on the evolution of affirmative action in Australia, G. Moens, op. cit., pp. 53-74, and for a history on affirmative action in the United States, D. McWhirter. The end of affirmative action, where do we go from here?, New York, Birch Lane Press, 1996.

[75] T. Sowell, (op. cit., p. 165) recalls that in the United States, preferential policies have repeatedly been rejected in public opinion polls. However, the same United States public has strongly supported special educational or vocational courses, free of charge, for the empowerment of minority groups.

[76] United Nations Department for Economic and Social Information and Policy Analysis, Report on the World Social Situation, 1997 (E/1997/15), chap. VIII, para. 94.

Annex

QUESTIONNAIRE ON AFFIRMATIVE ACTION

1. What are the principal constitutional and/or legislative provisions relating to the principle of equality and the prohibition of discrimination? Please provide copies of the relevant provisions.

2. Provide landmark judgements relating to the principle of equality and the prohibition of discrimination.

3. Are there any provisions of a constitutional, legislative or executive nature referring to the concept of "affirmative action" and/or of so-called "positive" or "reverse" discrimination? If so, please provide copies of the relevant provisions.

4. What, according to those provisions or to national case law, is the relationship between prohibition of discrimination and the concept of affirmative action?

5. Provide examples of national affirmative action schemes implemented pursuant to those provisions.

6. What groups are targeted by those affirmative action schemes (women, racial groups, specific minorities, indigenous peoples, migrants, disabled persons, veterans, etc.)?

7. To what fields do those affirmative action schemes apply (education, employment, housing, transportation, the ballot box, training, appointments to political, executive or judicial posts, the award of contracts or scholarships, other fields)?

8. What is the historical context in which those affirmative action schemes have been adopted?

9. What are the stated objectives in relation to those affirmative action schemes?

10. Are there any time limits to those affirmative action schemes and how will it be determined whether and when the objectives of those affirmative action schemes are achieved?

11. Do the affirmative action schemes apply equally to all groups involved or are any distinctions made in favour of one or more specific groups over others? How are those specific groups defined?

12. Is there any national case law relating to those affirmative action schemes? If so, please provide copies of the principal judgements.

13. Are there any specific bodies, authorities, commissions, tribunals or courts competent to hear complaints in relation to the implementation and operation of affirmative action schemes?

14. Who is entitled to lodge complaints and start proceedings before such organs?

15. Provide, if available, statistics indicating the success of affirmative action schemes and particularly the progress made since their introduction.

Note: If affirmative action schemes relating to different groups have been adopted, answers should be given for each group specifically.
