

AFFIRMATIVE ACTION: A NEVER-ENDING  
STORY?

by

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Thesis submitted for the degree of  
Doctor of Philosophy

Law School  
Faculty of Professions  
The University of Adelaide, Australia

March 2013

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## ABSTRACT

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Affirmative action addresses the phenomenon of historical and present disadvantage for groups including racial minorities and women within societies around the world. The thesis interrogates the concept of affirmative action in employment in three jurisdictions: the United States, Canada and Australia. It focuses on how these countries construct, measure and determine limits for specific affirmative action programs at the workplace.

The thesis begins with a critical investigation of the meaning of affirmative action, followed by an analysis of its theoretical justification by various scholars. International guidelines of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) are considered for the national implementation of affirmative action in the comparator countries.

The thesis outlines affirmative action in the three key jurisdictions noting differences in their approach to implementation. These analyses lead to the conclusion that there are two types of affirmative action, of which the first addresses equality of opportunity and the second equality of outcome. Both types of affirmative action require different methods of implementation. Whilst the first type is more effective through the application of pro-active permanent strategies, the second type should be based on specific targets and temporal limits, which need to be reassessed after their deadlines have been reached. At this point, either the latter type of affirmative action should be ended or readjusted to meet the challenges of multi-cultural societies today.

It is concluded that affirmative action is theoretically justifiable and has an important role in the achievement of equal opportunities and equality of outcome. However, its justification is reliant on it being appropriately limited in time or limited to the achievement of specific outcomes. The thesis ends by offering an analysis of the different ways of limiting affirmative action, and suggests what limits are most appropriate and effective.

## ACKNOWLEDGEMENTS

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It has been a great experience and honour to dedicate the last 3.5 years to writing a PhD dissertation in Australia. This wonderful country has shown me only kindness and provided me with many friendships that have given me the emotional support for being away from my family and friends in Germany for so long.

I have been fortunate to receive support from the Law School of the University of Adelaide, who not only awarded me the title of Master of Comparative Law in partnership with the University of Mannheim in Germany in 2008, but also gave me the chance to return and write a PhD dissertation for which I am very thankful. The Law School of the University of Adelaide had a huge positive influence in my life that I will never forget.

Thank you to my supervisors, Alex Reilly and John Williams. Thank you for all your invaluable support, inspiration and motivation. You have both been wonderful supervisors and I could not have done it without you! Thank you for all the time you spent reading, critiquing and editing my thesis. Thank you.

I also thank the academic and professional staff of the Adelaide Law School for their camaraderie and assistance. Thank you to my fellow PhD candidates of the Thesis Writing Group, who helped me to lay the foundations of the thesis in its early beginnings.

I would like to acknowledge with gratitude the financial support I received from the University of Adelaide Scholarship and the International Postgraduate Research Scholarship, which made the writing of this PhD dissertation possible.

Finally, I would like to thank my friends and family for all their love and encouragement. Thank you for all your supportive calls, letters, emails and even visits from overseas that warmed my heart. A special thanks to my friend Mark, who inspired me to the amazing endeavour to write a PhD dissertation and whose constant loving support and understanding helped me to broaden my horizons in many aspects of life.

## DECLARATION

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This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution to Nicole M. Lederer and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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Signed

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Date

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## **CHAPTER ONE**

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### **INTRODUCTION**

## CHAPTER ONE

### INTRODUCTION

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#### I. THESIS

Despite increasingly sophisticated antidiscrimination laws, discrimination and inequality have proved remarkably resilient. This prompts questions about the limits of law's ability to achieve social change. One way forward is to fashion new legal tools, which impose duties to promote or achieve equality, rather than focusing on individual rights against specific perpetrators.<sup>1</sup>

Affirmative action addresses the phenomenon of historical and present disadvantage for groups including racial minorities and women within societies around the world. The thesis interrogates the concept of affirmative action in employment in three jurisdictions: the United States, Canada and Australia. It

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<sup>1</sup> Sandra Fredman, 'Breaking the Mold: Equality as Proactive Duty' (2012) 60(1) *The American Society of Comparative Law* 265.

focuses on how these countries construct, measure and determine limits for specific affirmative action programs at the workplace.

Affirmative action has been introduced as a temporary measure in the jurisdictions concerned based on two major international treaties – the *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. However, time limits for affirmative action legislation do not exist in the countries investigated. This gap raises the question of how affirmative action should be limited appropriately. This question has not been focused on by scholars so far. The aim of the thesis is to investigate how limits can be set to affirmative action legislation and policies in order to determine the most appropriate ways to achieve their outcomes. The thesis argues that affirmative action policies aiming at equal outcomes need to be limited in time to justify their application. It is important to accurately monitor affirmative action policies to determine when they have achieved their goals and can be ended. However, the thesis acknowledges that the comparator countries investigated in this thesis – the United States, Canada and Australia – have implemented affirmative action legislation without temporally limiting them. It is suggested that affirmative action legislation should be applied permanently as an ongoing response to inequality, whilst affirmative action policies based on this legislation should be temporally limited to address discrimination of women and ethnic minorities. Therefore, the value of monitoring and determining how to limit affirmative action policies appropriately is of great importance, which is elaborated further in the concluding chapter.

The thesis begins with a critical investigation of the meaning of affirmative action and provides a definition for affirmative action which is based on an analysis of its main characteristics. Furthermore, the requirements of international guidelines for the implementation of affirmative action in *CERD* and *CEDAW* are outlined. The investigation is followed by an analysis of theoretical justifications for affirmative action under the liberal theories of state.

The thesis assesses affirmative action legislation and policies targeted at addressing gender and race discrimination in employment in the comparator

countries. These analyses lead to the conclusion that there are two types of affirmative action, of which the first addresses equality of opportunity and the second equality of outcome. Although the concepts of equality of opportunity and equality of outcome are generally known, it has not been determined which one of these concepts affirmative action is designed to address. This thesis argues that affirmative action requires different methods of implementation in order to address the two concepts of equality adequately. Whilst the first type of affirmative action addressing equality of opportunity is more effective through the application of pro-active permanent strategies, the second type of affirmative action addressing equality of outcome should be based on specific targets and temporal limits, which need to be reassessed after their deadlines have been reached. This thesis also recommends that before an affirmative action policy is finally ended, it has to be determined whether a readjustment might be more suitable to the current circumstances.

Although affirmative action is accepted as a justifiable means to address inequality by human rights lawyers, its justification depends largely on the assumption that affirmative action is only applied temporarily based on *CERD* and *CEDAW*. The thesis concludes that affirmative action is theoretically justifiable and has an important role in the achievement of equal opportunities and equality of outcome. However, its justification is reliant on it being appropriately limited in time or limited to the achievement of specific outcomes. The thesis ends by offering an analysis of the different ways of limiting affirmative action, and suggests what limits are most appropriate and effective.

## **II. AFFIRMATIVE ACTION**

Despite the application of decades of anti-discrimination laws, the persistence of inequality and discrimination is still a major concern in multi-cultural societies. For decades affirmative action has been an important strategy, in addition to reactive anti-discrimination law, to promote substantive equality and tackle

discrimination.<sup>2</sup> However, the understanding of affirmative action and the design of affirmative action policies differ greatly across the world. Given the importance of its goals, it is crucial that affirmative action be designed in the most effective way possible.

Much has been written about affirmative action, but little focus has been given to how its limits should be designed based on *CERD* and *CEDAW*. Few studies have considered affirmative action in a comparative and international context, and those studies have not focused on the question of how to limit affirmative action.<sup>3</sup> Even the relatively few studies that have considered how to limit affirmative action have focused on a single country only.<sup>4</sup>

This thesis seeks not to engage in the controversial debate of supporters and opponents about the advantages and disadvantages of affirmative action. Instead, it seeks to understand how affirmative action can work effectively as a response to inequality if it is chosen as a policy response. However, this debate cannot be avoided entirely. The justifications for affirmative action are important for

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<sup>2</sup> The term ‘re-active anti-discrimination law’ refers to the limited way discrimination is addressed by anti-discrimination law. In general, anti-discrimination law simply prohibits discrimination, and addresses discriminatory situations retroactively by requesting proof of evidence from the victim of discrimination that he or she was treated in a discriminatory manner. However, anti-discrimination law can also include pro-active duties to prevent discrimination from occurring, for example in Pay Equity Legislation in Canada.

<sup>3</sup> See Elaine Kennedy-Dubourdieu (ed), *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate Publishing, 2006); Carol Lee Bacchi, ‘Arguing For and Against Quotas – Theoretical Issues’ in Drude Dahlerup (ed), *Women, Quotas and Politics* (Routledge, 2006) 32-4; Thomas Sowell, *Affirmative Action Around the World – An Empirical Study* (Yale University Press, 2004); Thomas E Weisskopf, *Affirmative Action in the US and India: a Comparative Perspective* (Routledge, 2004); John D Skrentny, *Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America* (University of Chicago Press, 2001); Charles V. Hamilton, *Beyond Racism: Race and Inequality in Brazil, South Africa and the United States of America* (Lynne Rienner, 2001); Erna Appelt and Monika Jarosch (eds), *Combating Racial Discrimination: Affirmative Action as a Model for Europe* (Berg, 2000); Penelope E Andrews (ed), *Gender, Race and Comparative Advantage: a Cross-National Assessment of Programs of Compensatory Discrimination* (The Federation Press 1999); Carol Lee Bacchi, *The Politics of Affirmative Action: “Women”, Equality and Category Politics* (SAGE Publications 1996); Julio Faundez, *Affirmative Action – International Perspectives* (ILO Publications, 1997 Reprint).

<sup>4</sup> The idea of temporally restricting affirmative action has been investigated only by a few scholars in a mostly limited scope, for example, ending affirmative action in higher education or employment in the United States. See Carol M Allen, *Ending Racial Preferences – The Michigan Story* (Rowman & Littlefield, 2009); Carl Cohen and James P Sterba, *Affirmative Action and Racial Preferences: A Debate* (Oxford University Press, 2003); Terry Eastland, *Ending Affirmative Action: a Case for Colorblind Justice* (Basic Books, 1996); Richard Epstein, *Forbidden Grounds – The Case Against Employment Discrimination Laws* (Harvard University Press, 1995).



determining the appropriate ways to construct limits to affirmative action programs.

Since affirmative action is an equality measure in response to discrimination, it is crucial to identify what type of equality affirmative action aims to achieve and what type of discrimination it targets. The thesis begins, therefore, with a discussion of equality and discrimination and their relationship with affirmative action.

Affirmative action aims to achieve equality of opportunity and equality of outcome, both of which are forms of substantive equality. The goal of substantive equality is not merely the same treatment for everyone, but the advancement of groups that have suffered disadvantages in society over a long period of time.<sup>5</sup> Equality of outcome takes the differences between people into consideration, which can result in different treatment of disadvantaged groups like women or minorities in order to achieve equal outcomes.<sup>6</sup> Equality of opportunity focuses on removing obstacles to the advancement of disadvantaged groups,<sup>7</sup> which does not always result in equal outcomes.<sup>8</sup>

The success of the design of affirmative action depends not only on what form of equality is pursued, but also on what type of discrimination is targeted. Affirmative action addresses systemic discrimination, which occurs when for example seemingly neutral employment practices result<sup>9</sup> in a disparate impact on a group with certain characteristics such as race or gender.<sup>10</sup> Systemic discrimination has a wider impact than individual discrimination by occurring on a systemic or institutional level.<sup>11</sup> Whilst individual discrimination is in general remedied by retrospectively applied anti-discrimination law, systemic discrimination requires a more proactive approach focusing on widespread

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<sup>5</sup> Sandra Fredman, *Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 26.

<sup>6</sup> *Ibid* 7.

<sup>7</sup> *Ibid* 18.

<sup>8</sup> Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68(2) *The Modern Law Review* 178.

<sup>9</sup> Chapter 2 II of this thesis discusses extensively what affirmative action is and how it is applied in the sector of employment, which is the focus of this thesis.

<sup>10</sup> Colleen Sheppard, 'Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law' (2012) 151(1-2) *International Labour Review* 7.

<sup>11</sup> *Ibid* 8.

intentional or unintentional practices that result in discrimination of certain groups in society.

In general, affirmative action measures, which are based on affirmative action legislation, include programmes that are designed to provide opportunities for qualified individuals of disadvantaged groups to achieve more substantive equality in societies. Affirmative action can be applied to groups regarding, for example, race and gender.<sup>12</sup> Also, affirmative action is applied in many areas, but is most prominent in the sectors of employment and education.<sup>13</sup>

In employment, affirmative action programmes can entail outreach measures like the recruitment of qualified individuals of a target group, or support measures like training, development and promotional advancement of the latter, for example, through the application of numerical goals.<sup>14</sup>

Affirmative action applied in employment is commonly implemented in the sector of federal employment.<sup>15</sup> However, private parties can also be required to implement affirmative action policies under certain circumstances, for example, if private companies engage in government contracting in the sectors of construction or supply and services.<sup>16</sup>

The thesis regards the purpose of affirmative action to be the elimination of the effects of past discrimination, the elimination of present discrimination, and the prevention of future discrimination by enhancing and promoting substantive equality.<sup>17</sup>

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<sup>12</sup> See for example *CERD* article 1(4) and *CEDAW* article 4(1).

<sup>13</sup> See also Chapter 2 II 'Forms of Affirmative Action' in this thesis.

<sup>14</sup> UN Committee on the Elimination of Discrimination against Women (*CEDAW*), *CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)* (2004), paragraph 22. Chapters 4 to 6 in this thesis elaborate in detail what type of affirmative action measures are applied in the jurisdictions investigated.

<sup>15</sup> See for example the *Equal Employment Opportunity Act of 1972* in the United States, which is investigated in Chapter 4 IV C and the *Equal Employment Act 1995* in Canada, which is investigated in Chapter 5 IV A.

<sup>16</sup> See for example the implementation of affirmative action in the United States in Chapter 4 V B, and Chapter 5 V B for the implementation of affirmative action in Canada.

<sup>17</sup> The definition for discrimination used in this thesis is explored in Chapter 2 III A.

### III. THE NEED FOR LIMITS FOR AFFIRMATIVE ACTION

Affirmative action policies can only be regarded as justified if they are ended as soon as their goals are reached, which implies that the requirements for these policies have been fulfilled and therefore they can cease to exist. Temporal limits are necessary for affirmative action because only its beneficiaries are eligible to receive preferential treatment. Therefore, despite its positive objectives, affirmative action is often criticised for being nothing more than reverse discrimination.<sup>18</sup> A major criticism of affirmative action policies is that if they are applied for a longer period than necessary, they cease to be more than normative statements by becoming an injustice to those who do not benefit from them. Therefore, affirmative action is particularly vulnerable to the criticism of reverse discrimination if it has no clearly defined rationale and no clearly defined limits. Despite their importance, timetables and limits for affirmative action programs and measures are rarely debated and in some jurisdictions are not used at all.

As noted above, the thesis investigates the limits of affirmative action in three countries; the United States, Canada and Australia. All three countries find guidance for the implementation and design of affirmative action from two international treaties; *CERD* and *CEDAW*.<sup>19</sup> When the United States, Canada and Australia ratified *CERD*,<sup>20</sup> they committed to condemning and eliminating racial discrimination by prohibiting and ‘bring[ing] to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization’.<sup>21</sup> Besides their commitment to *CERD*, Canada

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<sup>18</sup> See Thomas E Weisskopf, *Affirmative Action in the US and India: A Comparative Perspective* (Routledge, 2004).

<sup>19</sup> The International *Convention on the Elimination of All Forms of Racial Discrimination* (*CERD*) was adopted and opened for signature on 21 December 1965, and entered into force on 4 January 1969. The International *Convention on the Elimination of All Forms of Discrimination against Women* (*CEDAW*) was adopted and opened for signature on 18 December 1979, and entered into force on 3 September 1981.

<sup>20</sup> The United States ratified *CERD* on 21 October 1994 (after having signed it on 28 September 1966), Canada ratified *CERD* on 14 October 1970 (after having signed it on 24 August 1966), and Australia ratified *CERD* on 30 September 1975 (after having signed it on 13 October 1966).

<sup>21</sup> *CERD*, above n 12, article 2(1)(d); The United States regards *CERD* as a ‘non-self executing’ treaty, which means that specific legislation in regards to *CERD* has to be firstly adopted and implemented before *CERD* can have any domestic legal effect. As a consequence, US courts cannot apply *CERD* provisions directly within the United States, even though the *US Constitution* directly states in Article VI that international treaties (like *CERD*) are regarded ‘as

and Australia have also committed to tackling gender discrimination, which includes the use of special measures for the acceleration of substantive equality for women in order to modify and eliminate ‘cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women’.<sup>22</sup>

Whilst Canada and Australia signed and ratified *CEDAW*, the United States only provided its signature in 1980 without ratifying this international treaty.<sup>23</sup> However, the Obama Administration of the United States has started to review *CEDAW* and it is hoped by human rights advocates that its ratification might occur in the near future.<sup>24</sup>

*CERD* and *CEDAW* refer to affirmative action as ‘temporary special measures’.<sup>25</sup> The temporary nature of special measures is reflected in several statements in

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part of “the supreme Law of the Land” binding on all local, state and federal authorities’. US Human Rights Network’s CERD Working Groups on Local Implementation and Treaty Obligations, *US CERD Obligations and Domestic Implementation – Article 2 – Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination* (February 2008) 2.

<sup>22</sup> UN Committee on the Elimination of Discrimination against Women (*CEDAW*), *CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)* (2004) paragraph 38.

<sup>23</sup> Adrien K Wing and Samuel P Nielsen, ‘An Agenda for the Obama Administration on Gender Equality: Lessons from Abroad’ (2009) 107 *Michigan Law Review First Impressions* 125; The United States has never ratified *CEDAW*, but signed it on 17 July 1980; Canada ratified *CEDAW* on 10 December 1981 (after having signed it on 17 July 1980), whilst Australia ratified *CEDAW* on 28 July 1983 (after having signed it on 17 July 1980). It has been speculated that one of the reasons why the United States has not ratified the most ‘significant treaty guaranteeing gender equality’ so far, might be its unwillingness to submit itself to international scrutiny in regards to gender equality. Marjorie Cohn, ‘Resisting Equality: Why the US Refuses to Ratify the Women’s Convention’ (2004) 27 *Thomas Jefferson Law Review* 16, 25; Other possible reasons why the United States has refused to ratify *CEDAW* so far might be that *CEDAW* allegedly supports abortion rights (which is untrue); traditional gender roles ‘with regard to upbringing children’ would need to be redefined; prostitution could not be regarded as a crime anymore; and that *CEDAW* ‘would require the legalizing same-sex marriage’. Harold Hongju Koh, ‘Why America Should Ratify the Women’s Rights Treaty (*CEDAW*)’ (2002) 34 *Case Western Reserve Journal of International Law* 272-3.

<sup>24</sup> Jessica Riffin, ‘The Potential Impact of *CEDAW* Ratification on US Employment Discrimination Law: Lessons from Canada’ (2011) 42 *Columbia Human Rights Law Review* 552-4; The hope for a possible future ratification of *CEDAW* by the United States could be due to the fact that its failure to ratify it, is said to be detrimental for ‘international relations as well as US efforts to promote gender equality abroad’. Recently, ‘US advocates for *CEDAW* note that under the Obama administration there is an increased desire to promote a positive American image abroad, as well as stronger domestic support for international human rights law, as evidenced by the fact that a number of municipalities have independently expressed support for *CEDAW*’: at 555.

<sup>25</sup> *CERD*, above n 12, article 1(4); *CEDAW*, above n 12, article 4(1); UN Committee on the Elimination of Racial Discrimination (*CERD*), *CERD General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of*

*CERD* and *CEDAW*. For example, special measures have to be discontinued ‘after [their] objectives have been achieved’.<sup>26</sup> Also the ‘maintenance of unequal rights or separate standards’ for different groups is explicitly excluded as a valid measure in response to inequality.<sup>27</sup>

Member states of both Conventions are left with much discretion for the implementation and design of affirmative action due to the fact that both Conventions ‘must be interpreted and applied taking into account the circumstances of contemporary society’.<sup>28</sup> These circumstances reflect the current situation of ethnic and racial minorities and women in the member states. This makes it necessary for member states to take seriously their responsibility to implement targets and limits by setting definite, achievable and foreseeable end points for their affirmative action policies. Although international law does not set temporal limits for affirmative action itself due to the fact that it must be applied to a variety of historical, political, and social circumstances in different signatory states, individual states are required to set definite limits for affirmative action. Although states have a discretion as to how they comply with the requirements of *CERD* and *CEDAW*, guidelines exist.<sup>29</sup>

These guidelines emphasise that no proof of past discrimination is necessary to validate affirmative action, but instead that the focus should be ‘on correcting present disparities and on preventing further imbalances from arising’.<sup>30</sup> Hence, temporary special measures ‘may have preventive as well as corrective functions’.<sup>31</sup>

Overall, both *CERD* and *CEDAW* emphasise that special measures have to be goal-oriented and therefore temporary, because as soon as their goals are achieved they are not necessary anymore.<sup>32</sup> However, the temporal limits on

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*All Forms of Racial Discrimination* (2009) [13]; UN Committee on the Elimination of Discrimination Against Women (*CEDAW*) above n 15, paragraph [22].

<sup>26</sup> *CERD*, above n 12, article 1(4); *CEDAW*, above n 12, article 4(1).

<sup>27</sup> *Ibid.*

<sup>28</sup> UN Committee *CERD*, above n 18, [5].

<sup>29</sup> *Ibid.*

<sup>30</sup> UN Committee *CEDAW*, above n 15, [18]; UN Committee *CERD*, above n 18, [22].

<sup>31</sup> UN Committee *CEDAW*, above n 15, [18]; UN Committee *CERD*, above n 18, [23].

<sup>32</sup> *CERD* article 1 (4), *CEDAW* article 4 (1).

affirmative action required by *CERD* and *CEDAW* are expressed broadly.<sup>33</sup> They may, in fact, allow for an ongoing use of affirmative action policies with no definite endpoint. It is therefore questionable whether or not the application of affirmative action legislation has to have a temporal endpoint itself, or if only specific affirmative action programmes and measures based on affirmative action legislation are in need of a temporal limitation.

The lack of limits of affirmative action in the jurisdictions of the comparator countries raises questions about the rationale for affirmative action. Is it truly aimed at overcoming discrimination at some point in time or is the lack of limits a sign that there is an underlying belief that equality cannot be achieved? If equality cannot be achieved, are there other strategies which should be pursued in place of, or alongside, affirmative action?<sup>34</sup> Or should affirmative action be recast as an empowerment strategy, with the focus being on monitoring obstacles to equality rather than reaching targets? Through an interrogation of these and other questions, the thesis hopes to assess the effectiveness of affirmative action as a policy response to discrimination in the comparator countries.

#### IV. METHODOLOGY

In this comparative study the comparator countries share sufficient characteristics in common to make a comparison between them possible.<sup>35</sup> A successful comparison requires similar legal systems, legal institutions and societal structures.<sup>36</sup> The United States, Canada and Australia share some important legal and social characteristics relevant to this study: their legal systems are based on the common law, they are all settler-colonial societies with

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<sup>33</sup> The requirements of *CERD* and *CEDAW* in regards to temporal limits are elaborated in detail in Chapter 2 III.

<sup>34</sup> This issue is further elaborated in the concluding chapter of the thesis.

<sup>35</sup> Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39(1) *The American Journal of Comparative Law* 6.

<sup>36</sup> Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) *Cambridge Law Journal* 313-15. Also, a comparative study must focus on the same object in all comparator countries, which is the design and implementation of affirmative action legislation in this thesis.

significant Indigenous minorities, and they all have similar immigration histories, beginning as predominantly European societies that became increasingly multi-cultural in the second half of the 20<sup>th</sup> century.<sup>37</sup> The legal systems of all three countries are based on written constitutions, and they have all implemented anti-discrimination laws and affirmative action policies to tackle discrimination.

The way in which law and social justice are interconnected reflects to a certain extent the ‘desires, needs and aspirations’ of the societies of the United States, Canada and Australia.<sup>38</sup> All three countries acknowledge the need to remedy past discrimination of historically disadvantaged groups, the need to prevent present and future discrimination, and all three countries share the aspiration of enhancing the inclusion of all ethnic groups within their multi-cultural societies.

To understand the theoretical basis for affirmative action and the requirement for limits, the thesis considers affirmative action through the lens of various strands of liberal political theory. The thesis discusses political, egalitarian and communitarian liberalism as variations of liberalism that can accommodate affirmative action as a response to inequality. It is shown how each strand of liberalism requires the extent of affirmative action policies to be limited in different ways to remain justifiable.

The thesis limits itself to two particular forms of discrimination and a particular activity – racial and gender discrimination in employment. Discrimination in employment has been chosen because it represents one of the largest and most important sites for the distribution of wealth and opportunity. Women and racial minorities represent a major part of the societies in the key jurisdictions investigated, and discrimination against these groups has been well documented and theorised.

The thesis is limited in this way because the different forms of discrimination can vary depending on the group who is suffering discrimination and the activity

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<sup>37</sup> The history of discrimination against ethnic minorities in the United States, Canada and Australia differ in details from each other. For example, slavery of Africans was mainly practised in the US, whilst discrimination against indigenous people was common in all countries. However, today all countries involved in this thesis are multi-cultural and struggle with discrimination against immigrant groups from all over the world.

<sup>38</sup> Watson, above n 36, 313.

or opportunity which is the ground for the discrimination. Hence, the historical origin and parameters of discrimination on the basis of race differ from discrimination based on gender or disability, and discrimination in the work place has different characteristics from discrimination in the pursuit of other activities, such as entry into higher education. It is beyond the scope of this thesis to identify the characteristic differences between discrimination of different groups and activities.

## **V. STRUCTURE OF THIS THESIS**

The first three chapters establish the need for limits of affirmative action, analyse the meaning of affirmative action and discuss its theoretical justification.

Chapter 2 offers a definition of affirmative action which is used throughout this thesis. Furthermore, the chapter briefly outlines the controversy surrounding the justification for affirmative action. Different types of discrimination and equality are investigated in order to determine what affirmative action aims to achieve. This chapter concludes that there are many different opinions on the parameters of affirmative action, but that major similarities can be found that lead to a similar use of the concept around the world and in the comparator countries, the United States, Canada and Australia. The chapter concludes that affirmative action is in need of temporal limits to remain justifiable and effective.

Chapter 3 takes the definition of the previous chapter and critically analyses the theoretical justification for affirmative action under various strands of liberal political theory. It considers which of classical liberalism, political liberalism, egalitarian liberalism and communitarian liberalism accepts affirmative action as a valid response to discrimination and what limits each theory requires of affirmative action policies for them to remain justifiable. Chapter 3 concludes that classical liberalism rejects the concept of affirmative action, whilst political, egalitarian and communitarian liberalism include the enhancement of substantive equality and are able to accommodate affirmative action policies if they are temporally limited.



Chapters 4, 5 and 6 critically investigate the implementation of affirmative action policies in the United States, Canada and Australia, with a particular focus on how the different jurisdictions apply limits to their affirmative action policies. Chapter 4 investigates how limits are applied to affirmative action in the United States, Chapter 5 addresses limits in Canada, and Chapter 6 concentrates on limits in Australia. All three countries implement affirmative action policies in different ways as well as setting limits to the policies differently. All three countries implement affirmative action under the framework of the international treaties of *CERD* and *CEDAW*.

Chapter 4 critically investigates the application of limits to affirmative action in the United States. As will be demonstrated, the United States has an ambivalent attitude towards affirmative action, which includes an ongoing controversy over whether or not it is constitutionally permitted. The chapter critically assesses the decisions of the United States Supreme Court in regards to affirmative action, in particular, the cases of *Johnson v Transportation Agency*<sup>39</sup> and *Adarand Constructors v Pena*.<sup>40</sup> The chapter investigates anti-discrimination law, specifically the *Title VII of the Civil Rights Act of 1964*, and specific affirmative action legislation in form of the *Equal Employment Opportunity Act 1972* as well as the presidential orders *Executive Order 10925* and *Executive Order 11246*. In addition, the chapter critically assesses the implementation of affirmative action through the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. Chapter 4 concludes that in the jurisdiction of the United States no overall deadline for the application of affirmative action legislation has been set. However, a variety of limits are identified, including the imposition of numerical goals and temporal limits.

Chapter 5 addresses the use of affirmative action in Canada. Affirmative action is called employment equity in Canada. It is specifically permitted in *Canada's Constitution*, and therefore its existence is not disputed. The supportive approach of the Supreme Court for employment equity is apparent in the case of *Canadian National Railway Co v Canada*.<sup>41</sup> The chapter investigates legislation aimed at

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<sup>39</sup> *Johnson v Transportation Agency*, 480 US 616 (1987).

<sup>40</sup> *Adarand Constructors Inc v Pena*, 515 US 200 (1995).

<sup>41</sup> *Canadian National Railway Co v Canada* [1987] 1 SCR 1114.

achieving employment equity; specifically, the *Canadian Human Rights Act 1977*, specific affirmative action measures in the *Employment Equity Act 1995* and the implementation of employment equity through the Legislated Employment Equity Program (LEEP) and the Federal Contractors Program (FCP). Whilst the United States anti-discrimination legislation includes a negative approach towards discrimination by prohibiting it, the Canadian anti-discrimination legislation not only prohibits discrimination, but also requires employers to take pro-active steps to prevent discrimination from occurring. Chapter 5 concludes that extensive affirmative action legislation has been implemented in Canada, which does not contain overall deadlines for the legislation itself, but includes numerical goals and temporal limits for affirmative action policies as required in Chapters 2 and 3 of this thesis.

Chapter 6 investigates the limits of affirmative action in Australia. In contrast to the United States and Canada, the *Australian Constitution* neither supports nor forbids affirmative action. The anti-discrimination legislation investigated in regards to limits for affirmative action are the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)*. Moreover, the chapter critically assesses specific affirmative action legislation in the form of the *Workplace Gender Equality Act 2012 (Cth)*. Chapter 6 concludes that although the setting of limits for affirmative action in Australia is made possible by relevant legislation, there is no focus on the application of numerical goals and temporal limits of affirmative action. Moreover, there is no overall endpoint set for the application of affirmative action legislation.

Chapter 7 identifies, reviews and critiques the existing goal-oriented and temporal limits for affirmative action in the case studies. The United States, Canada and Australia have interpreted the international treaties *CERD* and *CEDAW* in different ways in order to implement and set limits to affirmative action. The limits identified are assessed in relation to the requirements for affirmative action under *CERD* and *CEDAW* and the definition of affirmative action set out in Chapter 2. Moreover, Chapter 7 critically assesses whether the application of temporal limits for specific affirmative action programs and measures identified in the case studies, are truly necessary under the liberal theories of state that support affirmative action as investigated in Chapter 3.

Furthermore, Chapter 7 distinguishes two different types of affirmative action, which have to be implemented differently in order to be most effective. The first type of affirmative action focuses on equality of opportunity and the second type on equality of outcome. Whilst the first type should be applied on a permanent basis focusing on impartiality in hiring and promotion procedures, the second type has to include clear specific goals and temporal limits to avoid turning into reverse discrimination. If the desired goals of the second type have not been achieved until the deadline or minimum target of specific affirmative action measures are reached, they need to be readjusted and continued until their goals are achieved.

Chapter 7 outlines a method for the best way to implement affirmative action policies that takes temporal limits into account. However, the goal-oriented and temporally limited design of affirmative action policies does not exclude the permanent application of affirmative action legislation. In constantly changing multi-cultural societies, affirmative action should be regarded and applied as a permanent tool to achieve and maintain social justice for present and future generations by addressing the ongoing phenomenon of inequality.

## **CHAPTER TWO**

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### **MEANING OF AFFIRMATIVE ACTION**

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## I. INTRODUCTION

A universal definition of affirmative action does not exist.<sup>42</sup> Whilst the concept of affirmative action exists since the late 1900s,<sup>43</sup> the use of the term ‘affirmative action’ was first introduced by the executive order 10925<sup>44</sup> of U.S. President John F. Kennedy in 1961.<sup>45</sup> Executive order 10925 was introduced to prohibit discrimination in federal employment and to enhance the recruitment of minorities in government contracting.<sup>46</sup> The authors of this executive order attempted to craft a positive expression for the government’s policy and chose ‘affirmative action’ over ‘positive action’, ‘because it was alliterative’.<sup>47</sup> Another reason for this choice was to stress that in comparison to the Republicans, the Democrats and Liberals ‘intended a more aggressive strategy to pry open employment opportunities for minorities’.<sup>48</sup> However, at the time when executive order 10925 was issued in 1961, ‘affirmative action did not yet connote compensatory treatment or special preferences’, but instead ‘simply implied positive deeds to combat racial discrimination’<sup>49</sup> to achieve equality of opportunity.<sup>50</sup>

The concept of affirmative action has been further developed over time to include other elements like the preferential treatment for historically disadvantaged groups. This development started between 1965 and 1971 when the ‘dramatic underrepresentation’ of African-Americans in certain areas of

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<sup>42</sup> Julio Faundez, *Affirmative Action – International Perspectives* (ILO Publications, 1997) 27; United Nations Economic and Social Council and the Commission on Human Rights, ‘*Prevention of Discrimination – the Concept and Practice of Affirmative Action*’ (Working Paper E/CN.4/Sub.2/2002/21, 17 June 2002) 2-3; Elaine Kennedy-Dubourdieu (ed), *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate Publishing, 2006) 173.

<sup>43</sup> This issue is further elaborated in Chapter 4 II A.

<sup>44</sup> *Executive Order 10925* (EO 10925) s 301 (1) prohibits discrimination in government contracting on the basis of ‘race, creed, color, or national origin’.

<sup>45</sup> Terry H Anderson, *The Pursuit Of Fairness: A History Of Affirmative Action* (Oxford University Press, 2004) 60. *Executive Order 10925* is further elaborated in Chapter 4 IV A.

<sup>46</sup> Carl E Brody Jr, ‘A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court’ (1996) 29 *Akron Law Review* 302.

<sup>47</sup> *Ibid* 60-1.

<sup>48</sup> *Ibid*.

<sup>49</sup> The term ‘racial’ or ‘race’ is only used to identify a certain group. These terms do not refer to any genetic concept of race, which has already been proven by scientists to be invalid.

<sup>50</sup> Ira Katznelson, *When Affirmative Action Was White* (WW Norton & Company, 2005) 145.

employment was regarded as evidence that ‘racial proportionality’ at the workplace would be needed to achieve more substantive equality.<sup>51</sup>

The definition and implementation of affirmative action differs due to the different cultural and political backgrounds of countries using it.<sup>52</sup> Moreover, different countries, institutions and organizations use different terms to describe affirmative action policies.<sup>53</sup> Whereas countries including Brazil,<sup>54</sup> Namibia,<sup>55</sup> Northern Ireland,<sup>56</sup> the U.S. and South Africa<sup>57</sup> use the term ‘affirmative action’ for their preferential treatment of previously and presently disadvantaged groups, Australia uses ‘equal employment opportunity’<sup>58</sup> Canada uses ‘employment equity’,<sup>59</sup> the United Kingdom uses ‘positive action’,<sup>60</sup> India uses ‘positive discrimination’ and ‘reservations’,<sup>61</sup> and Sri Lanka uses ‘standardization’.<sup>62, 63</sup>

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<sup>51</sup> Matthew J Lindsay, ‘How Anti-Discrimination Law Learned to Live with Racial Inequality’ (2006) 75 *University of Cincinnati Law Review* 93-5. How to define different concepts of equality and what forms of equality affirmative action aims to achieve is investigated under section B in this chapter.

<sup>52</sup> For example, Nesiiah states that: The feminist movement in the USA is relatively militant and has forged some political links with those representing various minorities in defending and furthering affirmative action. In India, the feminist movement appears to be less politicized and relatively uncoordinated, and women are only a peripheral target of preferential policies. Devanesan Nesiiah, *Discrimination with Reason? - The Policy of Reservations in the United States, India and Malaysia* (Oxford University Press, 1997) 160.

<sup>53</sup> Thomas Sowell, *Affirmative Action Around the World* (Yale University Press, 2004) 21.

<sup>54</sup> Affirmative action in Brazil was introduced in the early 2000s, when Brazil changed from calling itself a ‘racial democracy’ to admitting having vast racial discrimination problems in its society. Edward Eric Telles, *Race in Another America: the Significance of Skin Colour in Brazil* (Princeton University Press, 2004) 47.

<sup>55</sup> Namibia’s affirmative action policies give preferential treatment to certain designated groups in society. It started with the *Affirmative Action (Employment) Act (1998)*. Michalle E Mor-Barak, *Managing Diversity: Toward a Globally Inclusive Workplace* (SAGE Publications, 2nd ed, 2011) 67-9.

<sup>56</sup> Northern Ireland implemented affirmative action policies starting with the *Northern Ireland Fair Employment Act (1989)*. Affirmative action policies do not only include minorities, but also the Catholic population; Bronagh Hinds and Ciaran O’Kelly, ‘Affirmative Action in Northern Ireland’ in Elaine Kennedy-Dubourdieu (ed), *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate Publishers, 2006) 103-104.

<sup>57</sup> South Africa started affirmative action policies in the 1990s and is embedded in the *South African Constitution (1996)*.

<sup>58</sup> Australia’s affirmative action policies started in the 1980s with the *Equal Employment Opportunity for Women in the Workplace Act 1986* (Cth). Mor-Barak, above n 55, 60.

<sup>59</sup> Canada’s employment equity started with the *Employment Equity Act, C 1995/ Ibid*.

<sup>60</sup> Great Britain introduced positive action legislation in the 1970s, including equal employment opportunities, sex, race and disability. Harish C Jain, Peter J Sloane and Frank M Horwitz, *Employment Equity and Affirmative Action: An International Comparison* (2003) 28.

<sup>61</sup> India started in the 1930s with reservation policies in regards to political representation for untouchables, which have been expanded after India’s independence to preferential treatment in government employment and higher education for designated groups. Sunita Parikh, *The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India* (1997) 147.

Despite the diverse use of the term of affirmative action, any critical investigation of how to design affirmative action must begin with a clear definition of affirmative action. The further parts of this chapter develop and establish a general definition for the concept which is derived from statute and case law, and the work of scholars investigating affirmative action.

## II. FORMS OF AFFIRMATIVE ACTION

The lack of a universal definition of affirmative action indicates the difficulty of establishing a common understanding for the concept.<sup>64</sup>

Andorra Bruno claims that the difficulty of defining affirmative action is due to its constantly changing meaning over time, which started out as remedial steps for past discrimination, and developed into obligations to hire individuals of disadvantaged groups in employment.<sup>65</sup> Generally, affirmative action includes some sort of preferential treatment for disadvantaged groups in society, for example women and ethnic minorities. This is mirrored by the definition of affirmative action by the U.S. Commission of Civil Rights, which regards these policies as measures that go ‘beyond the simple termination of a discriminatory practice’ by permitting the use of certain characteristics, such as gender or race, in order to provide opportunities to historically and presently disadvantaged groups.<sup>66</sup> Johan Rabe defines affirmative action more broadly as ‘actions or programs which provide opportunities or other benefits on the basis of their membership in a specified group’.<sup>67</sup> However, Faye J Crosby stresses that these

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<sup>62</sup> Sri Lanka introduced its standardization policy in the 1970s in higher education. Sowell, above n 53, 88.

<sup>63</sup> Ibid 2; Elisa Maaria Pylkannen, *Words that Carry Meaning: Issue Definition and Affirmative Action* (Master of Arts Thesis, McGill University, 2005) 52.

<sup>64</sup> Albert J Mosley, and Nicholas Capaldi, *Affirmative Action: Social Justice or Unfair Preference* (Rowman & Littlefield Publishers, 1996) 67.

<sup>65</sup> Andorra Bruno, ‘Affirmative Action in Employment’ in S N Colamery (ed) *Affirmative Action: Catalyst or Albatross?* (Nova Science Publishers, 1998) 59.

<sup>66</sup> US Commission on Civil Rights, Office of the General Council, *Briefing Paper for the US Commission on Civil Rights: Legislative, Executive, and Judicial Development of Affirmative Action* (1995) 1.

<sup>67</sup> Johan Rabe, *Equality, Affirmative Action, and Justice* (Books on Demand, 2001) 73.



opportunities should not be equated with arbitrary preferential treatment, because they are only applicable to qualified individuals of disadvantaged groups.<sup>68</sup>

The term ‘affirmative action’ includes various measures. Affirmative action measures include such action as ‘outreach or support programmes; allocation and reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems’.<sup>69</sup>

Affirmative action legislation serves as the basis for the implementation of specific affirmative action programs and measures, which can include a variety of preferential treatment. Affirmative action legislation is often included in ‘comprehensive anti-discrimination acts, equal opportunities acts or executive orders’.<sup>70</sup> Affirmative action policies include government policies and legislation as well as specific programs and single measures relating to preferential treatment, for example *Executive Order 11246* in the United States, and the *Employment Equity Act 1995* in Canada.

Affirmative action can be implemented through ‘decrees, policy directives and/or administrative guidelines formulated by national, regional or local executive branches of government to cover the public employment and education sectors’, which can include the ‘civil service, the political sphere and the private education and employment sectors’.<sup>71</sup>

Evidently, affirmative action can be applied in various ways as a versatile tool to tackle discrimination through a variety of legal mechanisms.

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<sup>68</sup> Faye J Crosby, *Affirmative Action is Dead, Long Live Affirmative Action* (Yale University Press, 2004) 3-7.

<sup>69</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 25: Article 4, Paragraph 1 of the Convention (Temporary Special Measures)* (2004) paragraph 22.

<sup>70</sup> *Ibid* paragraph 31.

<sup>71</sup> *Ibid*, paragraphs 22, 32. United Nations, Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination* (2009) paragraph 13.

### III. DEFINITION OF AFFIRMATIVE ACTION

For the purpose of this thesis, affirmative action is understood to be a temporally limited proactive measure to remedy lingering effects of past systemic discrimination, prevent present and future systemic discrimination, and to promote substantive equality of qualified individuals of disadvantaged groups in significant areas of society.<sup>72</sup>

The following sections explain the elements of this definition. It argues that there are three major factors that a definition of affirmative action must include: affirmative action must aim to eliminate systemic discrimination, it must aim to achieve substantive equality, and it must contain specific and ascertainable temporal limits.

#### A. *Affirmative Action and Discrimination*

In arriving at the definition of affirmative action outlined above, it is necessary to determine first what forms of discrimination affirmative action aims to eliminate. This section about affirmative action and discrimination analyses the concepts of discrimination for a better understanding of its magnitude and how affirmative action can be used to tackle it. Second, this section analyses the main forms of discrimination affirmative action focuses on. Third, it is necessary to address the proposition of opponents of affirmative action that these policies themselves are discriminatory and can therefore not be applied to eliminate discrimination.

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<sup>72</sup> Another goal of affirmative action policies is also seen in the enhancement of diversity. This goal has started to occur in the early 2000s (whilst the goal of the redress of past and present discrimination was introduced originally in the 1960s) and was mainly justified with the need of diversity in higher education. In 2003, the justices of the U.S. Supreme Court declared diversity a compelling state interest in the case *Grutter v Bollinger*, 539 US 306 (2003). Diversity in higher education has since been perceived as an important educational value. However, this goal has not been originally included into affirmative action policies, and therefore, it will be investigated as an additional target of these policies in a later chapter. See also Crosby, above n 68.

## 1. *Concepts of Discrimination*

Despite anti-discrimination laws that prohibit discriminatory behaviour, discrimination still exists in a variety of forms in all civilised societies.<sup>73</sup> This thesis is concerned with racial and gender discrimination, otherwise known as racism and sexism. In order to determine how affirmative action can achieve its goals most effectively it is necessary to fully comprehend the problems it addresses. Therefore, it is important to investigate the concepts of racism and sexism.

Racism is analysed in the literature in a range of ways. After explaining a range of ‘attitudes, beliefs, and institutions’ which constitute racism, John Arthur concludes that racism is ‘at its core an attitude people take toward other persons in virtue of their race’.<sup>74</sup>

Martin Marger argues that racism leads to the perception that ‘the achievements of groups at the top of the social hierarchy’ are a natural ‘product of innate superiority’, and ‘not of favourable social opportunities’.<sup>75</sup> The lack of success of ‘groups at the bottom of the social hierarchy is regarded as ‘a natural outcome of an inferior genetic inheritance rather than of social disadvantages that have accumulated for the group over many generations’.<sup>76</sup>

Glenn Loury regards racism as an attitude that is deeply embedded in the structure of society that is based on prejudice and stereotypes, which constantly contribute to present and future discrimination.<sup>77</sup> He regards ‘the substantial gap in skills between blacks and whites’ in the United States as ‘the result of processes of social exclusion’.<sup>78</sup> Social exclusion can lead to the lack of opportunities in life, because ‘opportunity travels along the synapses of social

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<sup>73</sup> See also Ronald Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Martinus Nijhoff Publishers, 2007) 1-7; Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005) 1-10.

<sup>74</sup> John Arthur, *Race, Equality and the Burdens of History* (Cambridge University Press, 2007) 8-9.

<sup>75</sup> Martin N Marger, *Race and Ethnic Relations: American and Global Perspectives* (Wadsworth, 9<sup>th</sup> ed, 2012) 19-20.

<sup>76</sup> *Ibid.*

<sup>77</sup> Glenn C Loury, *The Anatomy of Racial Inequality* (Harvard University Press, 2002), 95-6.

<sup>78</sup> *Ibid* 101.

networks'.<sup>79</sup> Loury concludes that an 'individual's inherited social situation plays a major role in determining his or her ultimate economic success'.<sup>80</sup>

The ideology underpinning sexism is similar to that of racism, with discriminatory practices being based on gender instead of race. David Newman believes that in male dominated societies (or 'patriarchies') gender inequality 'provides men with the ability to influence the political, economic and personal decisions of others [in contrast to women who lack this kind of influence]'.<sup>81</sup> Of course, women can also have sexist prejudices against men. However, Newman states that sexism against women is 'more likely to be reflected in social institutions, and has more serious consequences than women's sexism', and men 'take for granted the social arrangements that serve their interests'.<sup>82</sup>

Racism and sexism are so deeply embedded in society that they can occur in many unconscious ways, making them difficult to target. Anti-discrimination laws are only able to prohibit discrimination and address discriminatory situations re-actively after they have been discovered and proven. However, evidence of unconscious discrimination is often difficult to provide. In contrast,

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<sup>79</sup> Ibid 102.

<sup>80</sup> Ibid. Loury also claims that lingering effects of past and present racial discrimination create 'self-confirming racial stereotypes' that are detrimental for blacks. He illustrates his point with an example: 'Imagine a group of employers who harbor the a priori belief that blacks are more likely than others to be low-effort trainees. Suppose they observe the number of mistakes any employee makes on the job, but not the effort exerted by that employee during the training period. Let employers have the option of terminating a worker during the training period, and suppose they find it much more difficult to do so later on. Then employers will set a lower threshold for blacks than for other employees on the number of mistakes needed to trigger the dismissal, since, given their prior beliefs, they will be quicker to infer that a black worker has not put in enough effort to learn the job. Mistakes by black workers early in their tenure will provide evidence of the employers' worst fears, more so than an equal number of mistakes by other workers. Employers, will therefore, be less willing to extend the benefit of the doubt to blacks during the training period. But how will black workers respond to such behaviour by employers? It is costly to exert effort during the training period, and the reward for doing so can only be realized if an employee escapes termination. Knowing they are more likely to be fired if they make a few mistakes, an outcome over which they cannot exert full control, more black than other workers may find that exerting high effort during the training period is, on net, a losing proposition for them. If so, fewer of them will elect to exert themselves. But this will only confirm the employers' initial beliefs, thereby bringing about a convention in which the employers' racial stereotypes - 'blacks tend to be low-effort trainees' - will (seem to) be entirely reasonable': at 29-30.

<sup>81</sup> David M Newman, *Sociology: Exploring the Architecture of Everyday Life* (SAGE Publications, 2009) 384-5.

<sup>82</sup> Ibid. Newman further elaborates that 'men are not subject to objectification - that is, to be treated like objects rather than people', and that 'men's entire worth is not being condensed into a quick and crude assessment of their physical appearance': at 384-5. This thesis does not refer to matriarchies, which do only partly exist in rare indigenous populations. The culture of the countries investigated in this thesis - the United States, Canada and Australia - is based on patriarchies.

affirmative action is able to tackle unconscious discrimination by providing proactive remedies that help to raise impartiality, for example in hiring and promotion at the workplace, in order to prevent discrimination from occurring in the first place.

The way racist and sexist attitudes are displayed has changed over time. This brings us to the question of what forms of discrimination affirmative action focuses on.

## **2. Forms of Discrimination**

In the past, racial exclusion was an accepted moral attitude in societies, for example, in the United States, where slavery of imported Africans was practised until the middle of the 19<sup>th</sup> century.<sup>83</sup> Women were historically excluded to a large extent from certain areas in society, including employment.<sup>84</sup> Today, discrimination occurs in much more subtle ways.

There are two major forms of discrimination: individual and group discrimination. Whilst one individual can discriminate against another on grounds of race or sex, the ‘most consequential discrimination occurs at the group, organizational, community, and institutional levels’ in society, which is also called systemic discrimination.<sup>85</sup> Stephen McNamee and Robert Miller claim that systemic discrimination has the biggest negative impact on its target groups.<sup>86</sup> Carol Agocs defines systemic discrimination as:

‘complex and interrelated policies, institutionalized practices, norms and values that perpetuate exclusionary structures and relationships of power and opportunity within organizations and labour markets; at the level of the workplace, systemic discrimination may be embedded in a broad spectrum of employment-related

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<sup>83</sup> More precisely slavery was abolished through the Thirteenth Amendment of the *United States Constitution* in 1865. Richard Bulliet et al, *The Earth and Its Peoples* (Wadsworth, 5th ed, 2010) 647.

<sup>84</sup> Women started to turn from domestic work to the workforce by the beginning of the 20<sup>th</sup> century. See also Cecilia Bucki, *The 1930s - Social History of the United States* (ABC CLIO, 2009) 36.

<sup>85</sup> Stephen J McNamee and Robert K Miller Jr, *The Meritocracy Myth* (Rowman & Littlefield, 2<sup>nd</sup> ed, 2009) 190-1.

<sup>86</sup> McNamee and Miller further elaborate institutional discrimination: ‘These actions and practices are not episodic or sporadic; rather, they are practices and policies that groups, organizations, communities, and institutions engage in on a routine, everyday basis’. Ibid 190-1.

decisions affecting access to employment, job assignment, terms and conditions of employment, training and development, compensation, promotion, performance appraisal, quality of work life, work-family relationships, and termination. Moreover, informal social relations, networks of communication, and the quality of workplace culture and climate may perpetuate patterns of systemic discrimination. No matter what form it takes, systemic discrimination may exist in the absence of conscious intent to discriminate since it is enacted in decisions and behaviours that create inequality and unfairness for some groups within a workplace'.<sup>87</sup>

Systemic discrimination cannot be addressed by means that target individual discrimination with a traditional complaint-based model, where the victim lodges an official complaint against the discriminator, and receives some type of compensation if the accused is found guilty.<sup>88</sup> This is because systemic discrimination is not based on a single discriminatory incident, but on deeply entrenched traditional practices that lead to discrimination of certain groups.<sup>89</sup> Hence, a different type of response is necessary to address systemic discrimination appropriately.<sup>90</sup>

The necessity of targeting not only individual discrimination in employment through anti-discrimination measures, but also systemic discrimination through strategies such as affirmative action, has been recognised by many scholars and governments.<sup>91</sup> The pro-active approach of affirmative action is able to target seemingly 'neutral rules with discriminatory effect' that form 'a pattern which reflects an organisational or administrative structure' condoning or tolerating such actions.<sup>92</sup> In Canada, a governmental report concluded that '[w]hat is needed to achieve equality in employment is a massive policy response to systemic discrimination' including affirmative action, which due to its goals of

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<sup>87</sup> Carol Agoos, 'Canada's Employment Equity Legislation and Policy 1987-2000: The Gap between Policy and Practice' (2002) 23 *International Journal of Manpower* 3, 258.

<sup>88</sup> Craig, above n 73, 3, 127-32.

<sup>89</sup> Ibid.

<sup>90</sup> Whether or not an ongoing approach of affirmative action is acceptable with the proposition that these policies have to be temporally restricted is discussed later in this chapter.

<sup>91</sup> See also Vandenhoe, above n 73; and Sandra Fredman, 'Breaking the Mold: Equality as Proactive Duty' (2012) 60 (1) *The American Society of Comparative Law* 266.

<sup>92</sup> Craig, above n 73, 3.

erasing race and gender related discrimination is a vital tool to address systemic discrimination<sup>93</sup>

Although affirmative action is a viable tool to address systemic discrimination that can only be resolved by structural changes at the workplace,<sup>94</sup> opponents of affirmative action question whether affirmative action should be regarded as a legitimate response to discrimination, because affirmative action involves an element of reverse discrimination.

### ***3. Arguments For and Against Affirmative Action as a Response to Discrimination***

Affirmative action targets discrimination by providing preferential treatment to disadvantaged groups in society. Preferential treatment is a form of positive discrimination, which opponents of affirmative action claim exacerbates discrimination, rather than contributing to its end.<sup>95</sup>

Can affirmative action be justified as an exception to the principle of non-discrimination? The answer to this question is the subject of heated debates about the legitimacy of affirmative action.<sup>96</sup> Thomas Sowell argues that the discrimination involved in preferential treatment for minorities is no more acceptable than the discrimination it aims to address.

Often the claim is made that ‘benign’ preferences [affirmative action] are very different from the kind of racial discrimination found in the American South during the Jim Crow era or apartheid in white-ruled South Africa or the anti-

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<sup>93</sup> Rosalie Silberman Abella, Commission on Equality in Employment, *Equality in Employment: A Royal Commission Report* (1984) 7.

<sup>94</sup> Simone Cusack, ‘Discrimination Against Women – Combating its Compounded and Systemic Forms’ (2009) 34 (2) *Alternative Law Journal* 87.

<sup>95</sup> See for example, Loury, above n 77, 138, 209; and Thomas E Weisskopf, who focuses in his comparative international study *Affirmative Action in the US and India: a Comparative Perspective* (Routledge, 2004) on the costs and benefits of affirmative action in both countries. He concludes that the biggest difference between India and the United States regarding affirmative action is their different perception of these policies. Whilst the United States acknowledges that affirmative action enhances diversity, and values this development as vital in its multicultural society of today, India perceives affirmative action as rather detrimental, because its beneficiary groups are seen as underachieving and therefore these policies are perceived as a negative influence on the Indian society. Weisskopf regards affirmative action as a valid tool to overcome inequalities.

<sup>96</sup> Colleen Sheppard, ‘Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law’ (2012) 151 (1-2) *International Labour Review* 11.

Semitism of the Nazi era. But all group preferences are benign to those who benefit – and malign to those who pay the price.<sup>97</sup>

Similarly, Nicholas Laham believes that individuals of the non-beneficiary groups of affirmative action are unjustly burdened by it, which results in racist stereotyping of the minorities who benefit from affirmative action policies and enhances racial division.<sup>98</sup> Likewise Terry Eastland argues that affirmative action is problematic because it sets the basis for legal discrimination of majorities, which results in even more tension between majority and minority groups.<sup>99</sup>

Laham and Eastland are strongly supported by Thomas Sowell, who wrote one of the most important comparative international studies about affirmative action.<sup>100</sup> Sowell, a conservative African American economic scholar, claims that the empirical results of affirmative action demonstrate that it is more detrimental than beneficial. His findings draw a rather bleak picture of the so called beneficiary groups of affirmative action, which in his opinion, are very likely to face ‘escalating intergroup violence’ sooner or later.<sup>101</sup> Sowell stresses that it is impossible to remedy evils of the past by giving preferences to disadvantaged groups today, which in his view only ‘creates new evils’.<sup>102</sup> In his view, it is wrong to use group preferences and quotas as a remedy for past discrimination.<sup>103</sup>

Sowell’s view was originally shared by Nathan Glazer, an influential sociologist, who was convinced about the disadvantages of affirmative action and promoted the urgent need to end affirmative action in the 1980s.<sup>104</sup> He doubted the effectiveness of affirmative action policies and claimed affirmative action would

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<sup>97</sup> Sowell, above n 53, 183.

<sup>98</sup> Nicholas Laham, *The Reagan Presidency and the Politics of Race: in Pursuit of Colorblind Justice and Limited Government* (Praeger Publishers, 1998) 202; John H McWhorter, *Losing the Race: Self-Sabotage in Black America* (Free Press, 2000).

<sup>99</sup> Terry Eastland, *Ending Affirmative Action* (Basic Books, 1997) 195-204.

<sup>100</sup> Sowell compared affirmative action policies in various countries – the United States, India, Malaysia, Sri Lanka, and Nigeria. He assessed and outlined the consequences of affirmative action, but did not focus primarily on implementations and limits of these policies. Sowell, above n 53.

<sup>101</sup> Ibid 167.

<sup>102</sup> Ibid. See also Alan H Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979) 229.

<sup>103</sup> Sowell, above n 53, 183.

<sup>104</sup> Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (Basic Books, 1987, Reprint); Nathan Glazer, *We are all Multiculturalists now* (Harvard University Press, 2003, Reprint) 151-8.



be detrimental for race relations. However, over 10 years later Glazer revised his opinion about affirmative action, and stated that ‘without affirmative action, hardly any blacks would gain admission to top colleges, which undermines the legitimacy of American democracy’.<sup>105</sup> Glazer concluded that ‘the ‘culture wars’ (multiculturalism and racial discrimination) reflect many things, but when it comes to the division of blacks and others, they reflect a hard reality that none of us wants, that all of us want to see disappear, but that none of us knows how to overcome’.<sup>106</sup>

Another argument presented as to why affirmative action is not an appropriate tool for supporting disadvantaged groups is that liberal democracies enable all groups to decide their own destinies. The successful economic rise of African Americans, Jews and Chinese Americans from the beginning of the 20<sup>th</sup> century until the beginning of affirmative action in the 1970s in the United States is taken as evidence that affirmative action is not needed to help disadvantaged groups today.<sup>107</sup> This view is supported by Richard Epstein, who argues that the ‘principles of individual autonomy and freedom of association’ are violated by policies like affirmative action.<sup>108</sup> It is not only the autonomy and freedom of non-beneficiaries that is affected, but also that of the purported beneficiaries, who are necessarily marked as not being able to thrive equally without the assistance of the state through affirmative action policies.

However, the belief in the natural justice of liberal systems which is disturbed by policies like affirmative action is not shared by everybody.<sup>109</sup>

Many scholars in the field believe in the necessity of affirmative action to counteract the detrimental aspects of liberalism. Glenn C Loury<sup>110</sup> argues that

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<sup>105</sup> James Traub, ‘Nathan Glazer Changes his Mind, Again’, *The New York Times* (New York), 28 June 1998, 23.

<sup>106</sup> Ibid. See also Glazer, *We are all Multiculturalists now*, above n 104, 160-1.

<sup>107</sup> Sowell, above n 53, 193-4.

<sup>108</sup> Richard A Epstein, *Forbidden Grounds – The Case Against Employment Discrimination Laws* (Harvard University Press, 1995) 505.

<sup>109</sup> Liberalism and its relation to affirmative action is critically investigated in detail in Chapter 3 of this thesis.

<sup>110</sup> Glenn C Loury was at first opposed to affirmative action policies in the 1980s and early 1990s, because in his view these policies imposed detrimental influences on blacks in regards to their own efforts and merits in employment. He suggested that blacks under affirmative action started to rely on these policies instead of investing in their own skills development. Loury claimed that as a possible result, blacks are regarded as less qualified than their white counterparts by employers. Stephen Coate and Glenn C Loury, ‘Will Affirmative Action Policies

racial inequality in the United States is the result of the lingering effects of past and present prejudices, which cannot be ended by liberal individualism, but through governmental policy responses like affirmative action.<sup>111</sup>

Similarly, Eduardo Bonilla-Silva believes liberal individualism *contributes* to the racial inequalities of today.<sup>112</sup> Whilst he acknowledges that liberalism can be progressive for societies, he also argues that liberalism is often used to ‘rationalize racially unfair situations’.<sup>113</sup> Bonilla-Silva further argues that the ‘language of liberalism’ is often used by whites to ‘appear reasonable and even moral, while opposing almost all practical approaches to deal with de facto racial inequality’.<sup>114</sup> The liberal ideal and its relationship to affirmative action is further elaborated in Chapter 3.

Proponents of affirmative action regard it as a tool for positive social change. James P Sterba regards affirmative action as necessary to overcome a society that is ‘far from being racially, sexually, or economically just’.<sup>115</sup> He distinguishes between different types of affirmative action according to its various goals: outreach affirmative action, remedial affirmative action and diversity affirmative action.<sup>116</sup> He describes outreach affirmative action as the attempt to search out ‘qualified women, minority, or economically disadvantaged candidates who would otherwise not know or apply for the available positions, but then hire or accept only those who are actually the most qualified’.<sup>117</sup>

Sterba divides remedial affirmative action into two subtypes: the first subtype focuses on the elimination of ‘existing discriminatory’ practices to create, ‘possibly for the first time in a particular setting, a truly non-discriminatory playing field’, whilst the second subtype attempts ‘to compensate for past

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Eliminate Negative Stereotypes?’ (1993) 83 *The American Economic Review* No. 5, 1220 – 1240. Today Loury has changed his mind from recommending the end of affirmative action to recommending its continuation.

<sup>111</sup> Loury, above n 77, 138, 151.

<sup>112</sup> Liberal individualism is based on the idea of freedom of individuals including the freedom of choice, trade and opinion. Eduardo Bonilla-Silva, *Racism without Racists: Colour-blind Racism and the Persistence of Racial Inequality in the United States* (Rowman & Littlefield, 3<sup>rd</sup> ed, 2010) 27-8.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> James P Sterba, *Affirmative Action for the Future* (Cornell University Press, 2009) 32-3.

<sup>116</sup> Ibid 34.

<sup>117</sup> Ibid 34-5.

discrimination and its effects'.<sup>118</sup> Diversity affirmative action is also divided into two subtypes: the first subtype is supposed to achieve 'educational benefits', 'a more effective workforce in such areas as policing or community relations', and the second subtype attempts to 'more fully achieve equal opportunity'.<sup>119</sup> Sterba uses the differences between types of affirmative action to clarify the terms in debates about affirmative action policies.<sup>120</sup>

Other scholars who regard affirmative action as an important tool to redress gender and racial discrimination, particularly in employment, are Elaine Kennedy-Dubourdiou,<sup>121</sup> Penelope E Andrews,<sup>122</sup> and Barbara Bergmann.<sup>123</sup>

Despite the criticisms of affirmative action, this thesis proceeds on the basis that affirmative action is a legitimate response to discrimination, but only if it is designed in a way that properly addresses the causes of discrimination. The way affirmative action is designed must take into consideration not only the different forms of discrimination, but also different ways to address them. Therefore, it is important to understand the concept of equality as the goal of affirmative action

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid 34-5.

<sup>120</sup> Remedial discrimination defined by Sterba equates in general with the determination of two types of affirmative action in Chapter 7 of this thesis. Sterba's first sub-type of affirmative action for remedying discrimination focuses on levelling the playing field which equates to pro-active measures that enhance equal opportunities, for example enhancing impartiality in hiring and promotion; remedial discrimination which focuses on remedying effects of past discrimination equate to affirmative action measures aiming at substantive equality, for example, setting numerical goals and timetables. Ibid 4.

<sup>121</sup> Elaine Kennedy-Dubourdiou compares in her international social analysis of affirmative action around the world countries like Australia, Canada, Great Britain, India, Northern Ireland, South Africa and the United States. She stresses the impact of colonial pasts of countries and its effect on minorities and other races which still experience racial discrimination today. Kennedy-Dubourdiou, above n 56, 105.

<sup>122</sup> Penelope E Andrews, 'Affirmative Action in South Africa: Transformation or Tokenism?' in Penelope Andrews (ed), *Gender, Race and Comparative Advantage: a Cross-National Assessment of Programs of Compensatory Discrimination* (The Federation Press, 1999) 82.

<sup>123</sup> Barbara Bergmann explains why affirmative action is helpful for women and blacks in employment by stating that '[t]he chief argument in favour of the use of numerical goals and timetables for hiring and promoting is that without them women and blacks are likely to be excluded from many of the better jobs for years to come. If a workplace contains even a few men who would not be willing to accept a woman as their equal, much less as their superior, then the management may cater to their prejudices, rather than risk costly dissent. Discrimination deriving from this source is self-perpetuating, unless some new procedure forces change. The lack of women as colleagues reinforces men's feelings that women are inferior outsiders, which in turn makes it difficult for employers to have men and women working side by side in the same job as equal colleagues. Affirmative action enforced by a government agency offers a way to break the vicious circle – the firm's management is forced to institute selection procedures that short-circuit individual managers' and workers' prejudices.' Barbara Bergmann, *The Economic Emergence of Women* (Palgrave MacMillan, 2<sup>nd</sup> ed, 2005) 120; Bergmann argues states that 'affirmative action provides a series of practical steps for dismantling discrimination' at the workplace. Barbara Bergmann, *In Defense of Affirmative Action* (Basic Books, 1997) 9.

as well as the necessity of limits for these policies, which are critically analysed below.

### **B. *Affirmative Action and Equality***

Without a proper understanding of the type of equality affirmative action aims to achieve, it is impossible to assess what are appropriate ways to design affirmative action policies.

There are two main types of equality, formal equality and substantive equality. Substantive equality aims to achieve equality of outcome and equality of opportunity. Formal equality guarantees equal treatment before the law disregarding characteristics like gender or race.<sup>124</sup> It requires equal treatment regardless of the outcome that this equal treatment creates. It forbids different treatment. Substantive equality, on the other hand, takes personal circumstances and historical disadvantage into account in the determination of what is equal.<sup>125</sup> Substantive equality allows for different treatment to achieve equal results or equal opportunities. As their names suggest, equality of outcome focuses on equal results, whilst equality of opportunity focuses on the fair distribution of opportunities.

Given that affirmative action aims at the achievement of equality, it is important to determine what kind of equality affirmative action policies aim to achieve; formal or substantive equality. Julio Faundez,<sup>126</sup> who regards affirmative action as an important measure to achieve more equality, stresses that one of the big challenges for affirmative action is the ‘semantic confusion or ideological manipulation of the elusive notion of equality’.<sup>127</sup> This point of view is also taken by William M Leiter, who believes that part of the controversy around affirmative action is the uncertainty of its objectives, mainly the question of

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<sup>124</sup> Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-determination* (2000) 61.

<sup>125</sup> Ibid.

<sup>126</sup> Julio Faundez provides an overview over affirmative action in an international perspective in Australia, Canada, India, Malaysia and the United States, but does not investigate any limitations of these policies. Faundez, above n 42.

<sup>127</sup> Faundez, above n 42, 1.

whether or not equality means equal results or equal treatment of people.<sup>128</sup> The following analysis makes it clear that affirmative action is unquestionably a policy response in pursuit of substantive equality.

### **1. *Affirmative Action as the Pursuit of Substantive Equality***

Formal equality cannot be the goal of affirmative action since it disregards the differences between people that are at the heart of affirmative action policies. Affirmative action by its nature is the recognition that there are groups in society who require preferential treatment in order to achieve similar outcomes.

A key difference between men and women in the workplace makes this point clearly. Although the number of women at the workplace has significantly increased over the past decades, women still are not treated equally in employment in terms of pay, hiring and promotion opportunities, work assignments, and benefits.<sup>129</sup> Despite equal qualifications women often receive less pay for the same work than men in the same position.<sup>130</sup> These pay disparities might be partly based on the different gender roles of men and women in society. In general, women are held responsible for family matters, like child care, which might require frequent leaves of absence from work.<sup>131</sup> Today, women who have families juggle family and work responsibilities. This can result in different standards for men and women, for example, opportunities for hiring and promotion might often be diminished for women in comparison to men.

If these differences between men and women are disregarded, women are disadvantaged in the work place because of their additional family responsibilities.<sup>132</sup> Hence, in order to guarantee both genders the same

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<sup>128</sup> William M Leiter, *Affirmative Action in Antidiscrimination Law and Policy: an Overview and Synthesis* (2002) 4, 121.

<sup>129</sup> Jeri Freedman, *Women in the Workplace: Wages, Respect, and Equal Rights* (The Rosen Publishing Group, 2010) 6-7, 34.

<sup>130</sup> Raymond F Gregory, *Women and Workplace Discrimination – Overcoming Barriers to Gender Equality* (Rutgers University Press, 2003) 6-7.

<sup>131</sup> *Ibid* 8.

<sup>132</sup> Although there have been changes throughout the last 40 years in relation to family responsibilities between men and women, women are still the main caregivers when raising children in their first few years. Australian Institute of Family Studies, *Family Matters* (2008) 9, 10.

opportunities at work, the family responsibilities of women have to be taken into account, like paid parental leave, because ‘equal treatment results in unequal outcomes’.<sup>133</sup> In order to achieve equality in employment between men and women systemic and structural changes in employment are necessary.<sup>134</sup>

Substantive equality takes into account societal conditions such as those discussed above in the determination of equality.<sup>135</sup> Substantive equality is more ‘group-oriented’ than formal equality and provides more possibilities for inclusion of disadvantaged groups.<sup>136</sup>

Substantive equality includes two forms of equality, which are equality of outcome and equality of opportunity.<sup>137</sup>

Equality of outcome does not require identical outcomes for everyone, but it aims at a proportional representation of qualified individuals of disadvantaged groups who receive the opportunity to achieve a career in accordance to their best abilities in comparison to the representation of the majority.<sup>138</sup> For example, an imbalance in the representation of disadvantaged groups and the majority in the labour market is regarded as proof of discrimination in employment in need of a remedy.<sup>139</sup>

Equality of opportunity does not focus on equal results or outcomes measured by proportional representation, but on the distribution of equal prospects to gain opportunities.<sup>140</sup> This means that the aim is to present everyone with the same chance to seize an opportunity, for example in employment, but it depends on the individual person and his or her abilities as to whether the opportunity can be

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<sup>133</sup> Katharine T Bartlett, ‘Perspectives in Feminist Jurisprudence’ in Betty Taylor et al, *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography* (Fred B Rothman Publications, 1999) 6.

<sup>134</sup> See also Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002, Reprint) 411.

<sup>135</sup> Bartlett, above n 133, 6.

<sup>136</sup> Petra Foubert, ‘Equality and Prohibition of Discrimination in Employment’ in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Kluwer Law International, 2010) 398.

<sup>137</sup> Vandenhoe, above n 73, 290.

<sup>138</sup> Bartlett, above n 133, 7.

<sup>139</sup> Paul D Moreno, *From Direct Action to Affirmative Action* (Louisiana University Press, 1997) 2. The proportional representation of disadvantaged groups in employment is so far the only way to measure whether or not equal representation has been achieved. However, it has to be kept in mind that if certain groups do not aim to be represented in certain job categories, this type of measurement is not accurate anymore.

<sup>140</sup> Rabe, above n 67, 84.

seized successfully.<sup>141</sup> Systemic discrimination deprives people from having equal opportunities in employment based on characteristics like gender or race.

There are a number of scholars who support the notion that affirmative action is a means of achieving equality of opportunity. In an analysis of international treaties focusing on non-discrimination and equality, Wouter Vandenhoele regards affirmative action as a tool to achieve 'de facto' equality, which is related to equality of opportunity. Elaine Kennedy-Dubourdieu identifies the goal of affirmative action in Australia as 'producing greater social cohesion in Australian society through the promotion of migrant and Indigenous people's equality of opportunity', which she perceives as an 'expression of Australia's egalitarian tradition, with the stress put on the notions of what Australians call a 'fair go' and 'mate-ship'.<sup>142</sup> Carol Bacchi regards the goal of affirmative action as the enhancement of equal opportunities in 'an attempt to redress entrenched privilege' in a 'generally fairly functioning society'.<sup>143</sup> Richard D Kahlenberg regards affirmative action as pursuing equal opportunities, even though he would have them focus on socioeconomic inequalities rather than on disadvantaged groups based on characteristics such as gender or race.<sup>144</sup>

Affirmative action also aims at equality of outcome through the application of numerical goals with or without timetables, whilst affirmative action that aims at equality of opportunity focuses on pro-active measures in the hiring process to achieve its goals.<sup>145</sup>

Then, affirmative action is the pursuit of substantive equality through the elimination of the effects of past systemic discrimination, and the prevention of present and future systemic discrimination.

However, systemic discrimination must have an end point. The concept of inequality is the negative of equality and thus contains within it the implication that it is possible for social relations to be free of this state. When discriminatory

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<sup>141</sup> Ibid.

<sup>142</sup> Kennedy-Dubourdieu, above n 56, 105, 138.

<sup>143</sup> Carol Lee Bacchi, 'Arguing for and against Quotas – Theoretical Issues' in Dahlerup Drude (ed.), *Women, Quotas and Politics* (Routledge, 2006) 34-5; Carol Lee Bacchi, *The Politics of Affirmative Action: "Women", Equality and Category Politics* (SAGE Publications, 1996) 79.

<sup>144</sup> Richard D Kahlenberg, *The Remedy: Class, Race and Affirmative Action* (Basic Books, 1997) 1-10.

<sup>145</sup> Sandra Fredman, 'Breaking the Mold: Equality as Proactive Duty' (2012) 60 (1) *The American Society of Comparative Law* 266.

outcomes no longer exist and when opportunities are equalised, then there is no further inequality, and policies that are designed to proactively address inequality have no work to do, other than to disrupt the state of equality that has been achieved. Therefore, the continuation of proactive policies beyond the fulfilment of their goals is in fact damaging to the cause of equality. It is therefore imperative that proactive policies such as affirmative action are properly limited.<sup>146</sup>

### ***C. Affirmative Action and the Requirement of Limits in International Law***

The international treaties *CERD* and *CEDAW*, to which all comparator countries are signatories, require that affirmative action policies be time limited.

As discussed above, the requirement of a temporary application of affirmative action is an acknowledgement that discrimination can be eliminated over time, and substantive equality is possible for everybody at some point in the future.

#### ***1. International Treaties and Temporary Limits of Affirmative Action***

The United Nations Commission on Human Rights define affirmative action with an acceptance of its temporary nature. It states that ‘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’.<sup>147</sup> Moreover, *CEDAW* states in article 4(1) that special measures, which include affirmative action, ‘shall in no way entail as a consequence the maintenance of unequal or separate standards’. *CEDAW* elaborates that affirmative action ‘shall be discontinued when the objectives of equality of opportunity and treatment have been

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<sup>146</sup> There can be various limitations for affirmative action policies, which also includes that an affirmative action policy can go dormant if its requirements are fulfilled and awakens again if circumstances change. This issue will be elaborated in detail in the concluding chapter of this thesis.

<sup>147</sup> United Nations Economic and Social Council and the Commission on Human Rights, ‘Prevention of Discrimination – the Concept and Practice of Affirmative Action’ (Working Paper E/CN.4/Sub.2/2002/21, 17 June 2002) 2-3.



achieved'.<sup>148</sup> Similarly, the temporary nature of affirmative action is mentioned in *CERD* in Article 1 (4) which states that affirmative action cannot lead to the 'maintenance of separate rights for different racial groups', and 'that [affirmative action policies] shall not be continued after the objectives for which they were taken have been achieved'.<sup>149</sup>

The temporal limits for affirmative action under *CERD* and *CEDAW* have been interpreted in a variety of ways by member countries. In light of uncertainty about the temporal limits of affirmative action, committees under *CERD* and *CEDAW* have published general recommendations to clarify the meaning 'of temporary special measures' for its members.<sup>150</sup> Whilst both conventions repeatedly mention the temporary nature of affirmative action, they have not provided a specific definition for the term 'temporary'.

The UN Committee of *CEDAW* has stated that even though 'temporary special measures [affirmative action]' are not meant to last forever, they might be applied by the State Parties for 'a long period of time'.<sup>151</sup> More specifically, the duration of affirmative action 'should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time'.<sup>152</sup> Nevertheless, affirmative action has to be ended as soon as its 'desired results have been achieved and sustained for a period of time'.<sup>153</sup>

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<sup>148</sup> 'Discrimination' in the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* is defined in Part I Article I: 'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

<sup>149</sup> The United Nations *International Convention on the Elimination of All Forms of Racial Discrimination* defines the term discrimination in Article 1 (1): 'In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

<sup>150</sup> These general recommendations are the *CERD* General Recommendation No. 32: *The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Elimination (2009)* and the *CEDAW* General Recommendation No. 25 (2004) Article 4, [1].

<sup>151</sup> UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), above n 69, paragraph 20.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

One of the conclusions of this thesis is that limits need to be more specifically identified and applied for affirmative action policies. For this to occur there is a strong case for requiring that temporal limits for affirmative action be specifically outlined.

## **2. Temporal Limits for Affirmative Action**

In contrast to international conventions, temporal limits for affirmative action are rarely to be found in jurisdictions of countries using these policies.<sup>154</sup> Marc Bossuyt points out that ‘while this requirement [the temporary nature of affirmative action] is generally admitted [by legislators], the duration of most of these measures is ‘indefinite’, ‘open-ended’ or ‘indeterminate’ and no cut-off date is specified in the law.’<sup>155</sup> This is confirmed by Anne-Marie Mooney Cotter stating that:

from its outset, affirmative action was seen [by legislators] as a transitional strategy, with the intent that, in a period variously estimated from a generation to a century, the effects of past discrimination would be sufficiently countered that such a strategy would not be necessary anymore: the power elite would reflect the demographics of society at large.<sup>156</sup>

Although the temporary nature of affirmative action has not been investigated on a large scale by scholars, statements about the issue have been made on rare occasions. In the United States, the Supreme Court upheld affirmative action in *Grutter v Bollinger*<sup>157</sup> in 2003 and outlined for the first time an expiration date for these policies in higher education.<sup>158</sup> Justice O’Connor addressed temporal limits of affirmative action by stating that the Court expects ‘that 25 years from now, the use of racial preferences [affirmative action] will no longer be

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<sup>154</sup> See Conventions mentioned above.

<sup>155</sup> Marc Bossuyt, ‘The Concept and Practice of Affirmative Action’ in Ineke Boerefijn (ed), *Temporary Special Measures: Accelerating de facto Equality of Women under article 4(1) UN Convention on the Elimination of all Forms of Discrimination against Women* (2003) 71.

<sup>156</sup> Anne-Marie Mooney Cotter, *Race Matters: an International Legal Analysis of Race Discrimination* (2006) 11.

<sup>157</sup> (2003) 539 US 306.

<sup>158</sup> Katherine C Naff, ‘From Bakke to Grutter and Gratz: The Supreme Court as a Policymaking Institution’ (2004) 21 *Review of Policy Research* No. 3, 405-27. *Grutter v Bollinger* (2003) 539 US 306, 343.

necessary to further the interest approved today'.<sup>159</sup> This view of affirmative action is also supported by Charles V Dale, who describes the general attitude of the U.S. Supreme Court towards affirmative action by stating that 'all 'race-conscious' affirmative action remedies must be sufficiently flexible, temporary in duration, and 'narrowly tailored' so as to avoid becoming rigid 'quotas''.<sup>160</sup> Affirmative action policies are still used in the United States today, but legislators continue not to specify their end points.

A rare example of a country that has implemented temporary limits for affirmative action is India. However, these limits have been extended regularly 'at 10-year intervals' since India's independence in 1947.<sup>161</sup> Kanti Bajpai states that 'while the government [of India] has remained committed to reservations [affirmative action] and has extended the policy at ten-year intervals with no significant opposition, the achievements of the program are questionable'.<sup>162</sup> It seems that temporal limits for affirmative action are difficult to determine, and even if countries manage to implement legal deadlines for affirmative action, it is almost impossible to stay within these time limits to achieve the desired goals of affirmative action policies.<sup>163</sup>

Overall, the temporary character of affirmative action is mostly neglected by jurisdictions worldwide.<sup>164</sup> This raises the question why affirmative action policies have no legally enforced deadlines in most jurisdictions, even though legislators are aware of their temporary nature.<sup>165</sup>

One answer could be that affirmative action is meant to be more symbolic than truly effective. The only way affirmative action can be accepted as a permanent measure, is to accept and admit that affirmative action is not able to achieve its

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<sup>159</sup> *Grutter v Bollinger* (2003) 539 US 306, 343.

<sup>160</sup> Charles V Dale, *Affirmative Action Revisited* (Nova Science Publishers, 2002) 39.

<sup>161</sup> Lynne Bennington and Sugumar Mariappanadar, 'India' in Margaret Patrickson and Peter O'Brien (eds), *Managing Diversity – an Asian and Pacific Focus* (John Wiley & Sons, 2001) 94; Sowell, above n 53, 23.

<sup>162</sup> Kanti Bajpai, 'Diversity, Democracy, and Devolution in India' in Michael Edward Brown and Sumit Ganguly (eds), *Government Policies and Ethnic Relations in Asia and the Pacific* (MIT Press, 1997) 53-4.

<sup>163</sup> *Ibid.*

<sup>164</sup> This point will be further elaborated in the case studies of the United States, Canada and Australia in Chapters 4 – 6 in this thesis.

<sup>165</sup> The question about what temporal in accordance to *CERD* and *CEDAW* means was discussed on pages 37 and 38. It is not entirely clear how affirmative action should be applied. Therefore, this issue will be discussed in detail in the concluding chapter of the thesis.

goals of effectively eliminating race and gender discrimination, and that the social prejudices that underpin this discrimination is itself ongoing. If this answer is accepted, it suggests that governments implement affirmative action policies only to demonstrate symbolic sympathy for the historically and presently disadvantaged groups in society, already knowing affirmative action will never achieve its goals. This answer is unsatisfactory. It seems highly unlikely governments will invest significant resources in affirmative action policies that they know are certain to fail.

Another reason why legal deadlines of affirmative action might have been neglected by legislators is that it is very difficult to set precise deadlines for affirmative action as it is not possible to predict when the policies have achieved their goals.<sup>166</sup> How can governments assess when race and gender discrimination is eliminated?<sup>167</sup> What criteria do they use to make such an assessment?

Another explanation for why deadlines for affirmative action are rarely implemented is that there is a political cost to ending these policies. John D Skrentny has discussed this possibility in the United States stating that: ‘one part of the answer is that ... there is no organized opposition pushing them [politicians] ... but ... the more important reason is the fear of being branded a racist’.<sup>168</sup>

The temporary nature of affirmative action is required by international treaties like *CERD* and *CEDAW*, is acknowledged by legislators around the world, but is not adequately taken into consideration in the implementation of affirmative action policies.<sup>169</sup> These propositions represent the starting point of the investigation in this thesis. Affirmative action requires limits, but there is inadequate articulation of why this is the case, and inconsistent approaches to applying limits to affirmative action policies. In what follows, the thesis articulates why limits are required according to various strands of liberal political theory, outlines the legal framework and implementation of affirmative action in

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<sup>166</sup> Bajpai, above n 162. The difficulties to set deadlines for affirmative action policies can be monitored in India, where reservations (affirmative action policies) have been extended several times until today, and the goals of these policies have not been achieved yet.

<sup>167</sup> This point will be elaborated further in the following chapter.

<sup>168</sup> John D Skrentny, *The Minority Rights Revolution* (Harvard University Press, 2002) 340.

<sup>169</sup> The question whether or not such a temporary nature means temporal limits is elaborated further in the concluding chapter of the thesis.

the comparator countries, and analyses and critiques the various ways these jurisdictions have attempted to apply limits to affirmative action policies, and concludes with an assessment of what are the most effective means to place limits on affirmative action policy in theory and in practice.

#### **IV. CONCLUSION**

Overall, this chapter has provided a definition of affirmative action for this thesis by critically investigating the key characteristics of affirmative action based on the current literature as well as *CERD* and *CEDAW*. This definition is derived from the design of affirmative action which depends largely on what type of discrimination it focuses on and what form of equality it aims to achieve. International treaties require temporary limits for affirmative action. The lack of the latter in most jurisdictions gives rise to the question of whether or not a permanent application of affirmative action might be more appropriate. However, a permanent application of affirmative action must be justified. Therefore, the next chapter will investigate the rationale of affirmative action under the major contemporary political theories of state with a focus on whether affirmative action is only justifiable as a transitional measure and therefore must be limited in some way.

## **CHAPTER THREE**

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### **THE RATIONALE FOR AFFIRMATIVE ACTION**

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## I. INTRODUCTION

The United States, Canada and Australia have in common that they are contemporary liberal democracies. At the heart of these liberal democracies stands the idea of liberalism, which can be identified as individual freedom, autonomy and equality.<sup>170</sup> This concept is based on liberal political theories which provide the theoretical justifications for a just society. Affirmative action is a measure that aims to achieve a just society. This chapter interrogates whether affirmative action is compatible with the fundamental principles of liberalism by testing it against a number of competing liberal theories; classical liberalism, political liberalism, egalitarian liberalism and communitarian liberalism.

Whilst chapter one has investigated the way affirmative action responds to discrimination, and the understanding of equality it relies on, this chapter addresses the questions of whether or not different contemporary political theories are able to allow for its implementation, and under what conditions and circumstances the different political theories might be able to accommodate affirmative action. Although the basic principles of liberalism are themselves contested, the interrogation reveals that most strands of liberalism are compatible with affirmative action for different reasons, which will be elaborated in the following parts of this chapter. In addressing the theories, a particular focus is given to what the different political concepts suggest about the need for imposing limits on affirmative action policies as required by *CERD* and *CEDAW*.

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<sup>170</sup> Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007) 199.



## II. POLITICAL THEORIES OF LIBERALISM AND AFFIRMATIVE ACTION

In this chapter, the aim is to interrogate whether affirmative action is morally sound according to the major political theories of justice, which lay the foundations for the legal systems of the Western world. These political theories of justice have been developed during the history of Western societies in the search for a theory to explain the role of governments, and to justify government regulation in the lives of citizens.<sup>171</sup> There are many political theories regarding justice and equality. The focus of this analysis is liberalism, which underpins the legal systems of the countries involved in this thesis: the United States, Canada and Australia.

In the Western world, the political theory of liberalism can be regarded as the most influential political concept over the last two hundred and fifty years.<sup>172</sup> The early origins of liberalism can be found in the age of Enlightenment, the ideas from which played a vital role in the American Revolution as well as in the French Revolution, and whose political concept is implemented in contemporary liberal democratic societies of the Western world, like the United States, Canada and Australia.<sup>173</sup> The liberal way of thinking has at its core the values of freedom and equality. The main features of liberal political theories are individual freedom and autonomy, equality before the law, and a desire for a minimum of government influence on people's lives.<sup>174</sup> However, liberal theorists do not

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<sup>171</sup> Jason Lloyd, 'Let there be Justice: a Thomistic Assessment of Utilitarianism and Libertarianism' (2003) 8 *Texas Review of Law and Politics* 230.

<sup>172</sup> Pierre Manent, *An Intellectual History of Liberalism* (Princeton University Press, 1996) xv.

<sup>173</sup> Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society* (Springer, 2011) 29-31, 33, Zafirovski further elaborates that 'It is specifically the product and heritage of the Enlightenment principle of universal liberty originally formulated and articulated by Kant, Voltaire, Condorcet, Montesquieu, Diderot, Hume, and other authors, as distinguished from the pre- and anti-Enlightenment, such as pre-liberal "Christian" Catholic and Protestant medieval civilization and anti-liberal conservatism, respectively. As Hegel and other critics or sceptics admit, it is the Enlightenment, that for the first time within the medieval "Christian" world provides or envisions human society with "universal freedom" ... in the sense of "liberty for all" Individuals and groups a la Voltaire, Kant, Hume, and Jefferson': at 30.

<sup>174</sup> Although, the values of liberal political theories mostly revolve around individual liberty and autonomy, the term 'liberalism is notoriously difficult to define. The term has been used to describe a sprawling profusion of ideas, practices, movements, and parties in different societies and historical periods. Often emerging as a philosophy of opposition, whether to feudal privilege, absolute monarchy, colonialism, theocracy, communism, or fascism, liberalism has served, as the word suggests, as a force of liberation, or at least liberalization – for the opening up of channels of free initiative. But liberalism in its oppositional and even revolutionary moments has not

agree on all features of liberalism. Over time various types of liberal theory have been developed of which classical liberalism, political liberalism, egalitarian liberalism and the communitarian influence on liberalism are investigated in regards to their views on the implementation and limits of affirmative action.<sup>175</sup>

### **A. Classical Liberalism and Affirmative Action**

Classical liberalism places primary value on individual freedom and autonomy, free markets, protection of private property, and limited government.<sup>176</sup> Classical liberalism has many advocates, including John Locke, Montesquieu, John Stuart Mill, David Hume and Friedrich A Hayek.<sup>177</sup> Classical liberals are perceived ‘as autonomous, rational individuals [who are] dedicated to maximizing their interests’.<sup>178</sup>

Although classical liberalism can be regarded as a political theory that ‘calls for a collective search for the good’, which can include ‘a variety of end-results’, its view on affirmative action can be regarded as a very critical one.<sup>179</sup> The classical liberal ideas of a limited government and freedom of association or choice are at odds with the implementation of affirmative action. There are many bases for the classical liberal objection to affirmative action. First, affirmative action inhibits the freedom of employers to choose their employees. Second, the classical liberal

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necessarily been the same as the liberalism of established parties and governments. In different countries, depending on their particular histories, parties bearing the name “Liberal” have variously ended up on the right or left and thereby coloured the understanding of what liberalism means as a political philosophy’. Paul Starr, *Freedom’s Power: The History and Promise of Liberalism* (Basic Books, 2008) 2.

<sup>175</sup> The different variations of liberal theories comprise, inter alia, political liberalism, comprehensive liberalism, minimalist liberalism, perfectionist liberalism, rights-based liberalism, and teleological liberalism. Alan Ryan, ‘Newer Than What? Older Than What?’ in Ellen Frankel Paul et al (eds) *Liberalism: Old and New* (Cambridge University Press, 2007) 1.

<sup>176</sup> Richard A Posner, ‘Pragmatic Liberalism versus Classical Liberalism’ (2004) 71 *University of Chicago Law Review* 674; Olsen and Toddington, above n 170, 199; Brian Z Tamanaha, ‘The Dark Side of the Relationship between the Rule of Law and Liberalism’ (2008) 3 *NYU Journal of Law & Liberty* 519.

<sup>177</sup> Richard A Epstein, ‘The Classical Liberal Alternative to Progressive and Conservative Constitutionalism’ (2010) 77 *University of Chicago Law Review* 890.

<sup>178</sup> Tamanaha, above n 176, 519.

<sup>179</sup> Daniel J Herron and Don A Habibi, ‘Law, Ethics, and the Dilemma of Modern Liberalism’ (1995) 13 *Midwest Law Review* 10, 15.

requires formal equality before the law regardless of the underlying inequalities this masks.<sup>180</sup>

The classical liberal values of individual freedom in association and choice mean that ‘each person should have the maximum amount of freedom consistent with the freedom of others’, which also include that ‘the state should administer its coercive laws only to the extent necessary to guarantee this freedom’.<sup>181</sup> Given that racial and gender discrimination in employment affect the freedom of people negatively in their right to make free choices about their employment associations, the state would have to take action in order to prevent this from occurring.

Even though the government might have a duty to prevent discrimination from happening, it is questionable whether the classical liberal belief in a minimal government is able to prevent the state from enacting policies like affirmative action. Epstein states that ‘making any new concession to government power that rests on the claim that governments are better able to make choices for individuals than they are able to make for themselves’ is a mistake.<sup>182</sup> This is a common line of thought within the classical liberal tradition.<sup>183</sup> Classical liberals believe that it is vital to limit the power of governmental influence on people’s lives, because classical liberals perceive people as being well capable of making their own life choices.

Classical liberals value the importance of law, but only to the extent of protecting private property and preventing ‘force or fraud as means for altering the balance of entitlements and obligations in interpersonal relations’, which does not include policies like affirmative action.<sup>184</sup> Classical liberalism only accepts the law as far as it serves these purposes, and rejects any other

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<sup>180</sup> Tamanaha, above n 176, 522.

<sup>181</sup> Derek McKee, ‘The Public/Private Distinction in *Roncarelli vs Duplessis*’ (2010) 55 *McGill Law Journal* 474.

<sup>182</sup> Richard A Epstein, *Scepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago Press, 2004) 263.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid* 2, 263.

governmental influence as immoral.<sup>185</sup> Hence, this classical liberal view of a minimal government cannot accommodate affirmative action, which would impose limits on the freedom of association of people.

Moreover, classical liberals favour formal equality, which demands equal treatment before the law, rather than substantive equality, which is more concerned with achieving equality as an end result.<sup>186</sup> One of the reasons for this classic liberal view is that at the time classic liberalism was established as a political theory, its proponents were not aware of many of the inequalities we are aware of today, including systemic discrimination against women and minorities. The social and political development of societies has allowed women and minorities a higher level of participation over time, which has resulted in an enhanced awareness of the importance of not only equal treatment before the law, but also equality of outcome.

Based on their idea of equality, classical liberals view affirmative action as a form of reverse discrimination against the majority. This clearly offends the value classical liberals place on individual freedom of association. Classical liberals like Hayek, claim that ‘the equality before the law which freedom requires leads [necessarily] to material injustice’, and that ‘the desire of making people more alike in their condition cannot be accepted in a free society as a justification for further and discriminatory coercion’.<sup>187</sup> For classical liberals, affirmative action ‘exacerbates the very problem it was intended to solve, by making people more conscious of group differences, and more resentful of other groups’.<sup>188</sup>

Classical liberalism also rejects the idea of preferential treatment for minority groups and women not only because of its supposed counter-productivity, but also because this liberal idea of justice stresses the ‘principle of freedom

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<sup>185</sup> Norberto Bobbio, *Liberalism and Democracy* (Verso, 2006) 84.

<sup>186</sup> Andrea T Baumeister, *Liberalism and the ‘Politics of Difference’* (Edinburgh University Press, 2000) 32.

<sup>187</sup> Friedrich A Hayek, ‘Equality, Value, and Merit’ in Michael J Sandel (ed) *Liberalism and its Critics* (New York University Press, 1984) 82.

<sup>188</sup> Will Kymlicka, *Multicultural Citizenship* (Oxford University Press, 2004) 4.

(autonomy) over any principle of justice or any particular social end'.<sup>189</sup> As a result, classical liberals cannot agree with affirmative action, because their liberal idea of equality does not allow for any kind of restrictions imposed on the liberty and freedom of choice and association of individuals.

Although classical liberalism does not allow for the implementation of affirmative action, it has given rise to variations of the liberal ideal, which are based on different versions of equality. Developments in the liberal ideal are based on the observation 'that genuine liberty is defeated by social and economic conditions beyond the control of individuals', which includes the awareness that unrestricted free markets can lead to vast inequality amongst citizens.<sup>190</sup> Hence, new versions of liberalism have developed different concepts of equality within the political community that are more accommodating of government action to redress disadvantage and systemic discrimination.

### **B. *Political Liberalism and Affirmative Action***

The theory of political liberalism<sup>191</sup> is founded on the ideas of John Rawls, who coined the concept and term in order to find a 'solution to the problem of political stability in modern constitutional democracies'.<sup>192</sup> Political liberalism focuses on the creation of a 'purely political concept of justice', which is based

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<sup>189</sup> Bron Raymond Taylor, *Affirmative Action at Work: Law, Politics, and Ethics* (University of Pittsburgh Press, 1991) 69.

<sup>190</sup> Tamanaha, above n 176, 522.

<sup>191</sup> Political liberalism also comprises the form of postcolonial liberalism, which has at its core 'three distinctive liberal values: that individuals and peoples are fundamentally equal; that they are free; and that social and political arrangements should be such as to promote the well-being of individuals and groups in the manner, generally speaking, that they conceive of it'. Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press, 2002) 5.

<sup>192</sup> Shaun P Young, 'The Concept of Political Liberalism' in Shaun P Young (ed) *Political Liberalism: Variations on a Theme* (2004) 4; Young states further to the issue of the establishment of political liberalism that 'given the prominence and (some would say unavoidable) influence of Rawls's work, one might be tempted to argue that there is no such thing as a "non-Rawlsian" conception of political liberalism; however, such a claim is clearly false. Rawls himself contends that Larmore and Shklar, for example, developed their conceptions "entirely independently" of his. Thus though it might be difficult to deny completely Rawls's influence, it is, nevertheless, possible to argue credibly that "non-Rawlsian" conceptions of political liberalism have been produced': at 16.

on the idea that in ‘contemporary multi-cultural, and morally pluralist societies’ a neutral political foundation for justice is desirable to suit the needs of all.<sup>193</sup>

Political liberalism acknowledges that contemporary democratic societies consist not only of the ‘pluralism of comprehensive religious, philosophical, and moral doctrines but [of] a pluralism of incompatible yet reasonably comprehensive doctrines’.<sup>194</sup> In this statement Rawls emphasises the fact that even though different religions and philosophies of life can stand in sharp contrast to each other, each one of them – if assessed separately from each other - can be quite logical and reasonable by itself.

Political liberalism attempts to accommodate the vast diversity of ideas about the common good in a single political community. Political liberalism asks ‘how is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?’<sup>195</sup> Of course, such reasonable and comprehensive doctrines may also include the idea of implementing affirmative action. Hence, the question arises whether or not political liberalism is able to accommodate the implementation of these policies. The answer to this question depends largely on how political liberalism attempts to solve the problem of differing moral conceptions of the common good and how it defines equality in contemporary societies.

Political liberalism acknowledges the pluralism of moral conceptions in today’s societies, and attempts to find a just foundation for a stable society by outlining an acceptable concept of justice through Rawls’s hypothetical idea of an original position.<sup>196</sup> The original position represents a state of being, where citizens are kept in a so-called ‘veil of ignorance’, which means that they are hypothetically completely unaware of who they are in regards to their gender, nationality, colour, religion, and other possible characteristics and preferences.<sup>197</sup> In such a ‘veil of ignorance’, people have to use objective reasoning to achieve a mutually agreeable concept of justice.<sup>198</sup> Rawls posits that nobody under the ‘veil of

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<sup>193</sup> Ibid 4, 17.

<sup>194</sup> John Rawls, *Political Liberalism* (Columbia University Press, 2<sup>nd</sup> ed, 2005) xvi.

<sup>195</sup> Ibid xviii.

<sup>196</sup> Ibid 22.

<sup>197</sup> Ibid 23-7.

<sup>198</sup> Ibid 23-8.

ignorance' would take the risk to establish discriminatory principles that would be unjust to certain groups, because everyone under the 'veil of ignorance' might belong to a group affected by discrimination, which could only be discovered after revealing their true identities.<sup>199</sup> Hence, people under the 'veil of ignorance' would most likely aim to establish a society with no discrimination at all, or at least as little as possible. In order to create such a society, the establishment of equality amongst all seems vital.

What would people under the 'veil of ignorance' think about applying affirmative action to remedy the detrimental effects of past discrimination for historically disadvantaged groups in society? Of course, given the hypothetical lack of knowledge about their true identities, people under the 'veil of ignorance' would be faced with the possibility that each of them could belong to the historically disadvantaged groups of society. Hence, it can be assumed that people under the 'veil of ignorance' would be interested in some sort of legal remedy to balance the detrimental effects of past discrimination of the historically discriminated groups involved. Affirmative action, which is a tool to create equality 'between historically disadvantaged groups and those who are not disadvantaged', could therefore be of interest for people under the 'veil of ignorance'.<sup>200</sup>

Is the goal of remedying past discrimination in line with political liberalism? Political liberalism focuses on public reasoning for political purposes, amongst others. Hence, if remedying past discrimination could be justified by public reasoning, policies like affirmative action could be accommodated by political liberalism.

Rawls defines 'public reasoning' in a democratic society to be 'the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution'.<sup>201</sup> Public reasoning focuses on the 'political conception of justice', which includes matters about 'equal political and civil liberty, equality of opportunity' as well as

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<sup>199</sup> John Rawls, *A Theory of Justice* (Oxford University Press, 1999, first published 1971) 118-9.

<sup>200</sup> Paul Gomberg, *How to Make Opportunity Equal: Race and Contributive Justice* (Blackwell Publishing, 2007) 15.

<sup>201</sup> Rawls, above n 199, 214.

‘the values of social equality and economic reciprocity’.<sup>202</sup> In order to find political consensus through public reasoning, Rawls emphasises the importance of constitutional essentials, which have to be agreed upon by all citizens. For Rawls, ‘freedom of movement and free choice of occupation’ are constitutionally essential, while equal opportunity, though important, is not.<sup>203</sup>

Duncan Ivison extends Rawls analysis of public reason to claim that ‘public reason is the reason of democratic people seeking to justify the exercise of coercive political power lacking any prior established consensus on a substantive conception of justice’.<sup>204</sup> In this view, public reasoning can also be applied without focusing on Rawls constitutional essentials, which do not entail aspects of race and gender discrimination in relation to equal opportunities. Ivison confronts directly the question of whether political liberalism can respond to historical disadvantage.

Public reasoning entails the question of what is fair and just for individuals and the community as such. Therefore, it has to be determined by public reasoning if it can be regarded as fair and just that people living today would have to remedy discriminatory actions that were committed in the past. How can past injustices justify sacrifices of today’s society in the form of reverse discrimination by affirmative action in the present? Ivison claims that if past injustices remain ‘unaddressed, the moral rupture that occurred in the past persists in the present’, which results in ‘a violation or denial of just terms of association’ today.<sup>205</sup> He suggests that civic responsibilities arise with ‘one’s membership in a political community’.<sup>206</sup> Such a political community gives its citizens their political identity and constitutes ‘continuity through time’.<sup>207</sup>

Ivison concludes that ‘[a] sense of civic responsibility for the past is, arguably, connected to the way political membership is conceived’.<sup>208</sup> The political membership is tied to a collective responsibility, which includes ‘having certain special obligations towards [the political community] in virtue of that

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<sup>202</sup> Ibid 224.

<sup>203</sup> Ibid 228.

<sup>204</sup> Ivison, above n 191, 95.

<sup>205</sup> Ibid 100.

<sup>206</sup> Ibid 102.

<sup>207</sup> Ibid 102-3.

<sup>208</sup> Ibid 103.



membership'.<sup>209</sup> Therefore, it could be argued that members need to take responsibility for past injustices as a duty to their political community, whose individuals 'have an obligation to try and address the past given its effects in the present in relation to matters of basic justice in this community', that now belongs to them.<sup>210</sup> In this view, a political community that was involved in unjust discriminatory actions against women and minorities in the past would have to remedy such an injustice in the present. Furthermore, historically disadvantaged groups are still exposed to the detrimental effects of past injustices in the form of subtle racial and gender discrimination, for example, prejudices, stereotyping, and subtle racial and gender discrimination, which would have also to be addressed by the political community involved.

Altogether, affirmative action would seem to be a legitimate option to remedy the injustices of past race and gender discrimination as well as its detrimental effects in the present, for example in the area of employment. People who do not benefit from affirmative action have still the advantage of their historically privileged class, which places them in a better position to find an alternative job than members of historically disadvantaged groups. This supportive view of affirmative action might also be furthered by other elements of political liberalism, for example, Rawls's two principles of justice.

Rawls's original position under the 'veil of ignorance' supposedly generated 'two principles of justice that should structure constitutional democracies', which might support the view that political liberalism is able to accommodate the implementation of affirmative action.<sup>211</sup> These two principles of justice focus on equality and liberty as well as the conditions for acceptable inequalities, stating firstly that '[e]ach person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all', and secondly that '[s]ocial and economic inequalities are permissible provided that they are to the greatest expected benefit of the least advantaged; and attached to

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<sup>209</sup> Ibid 105.

<sup>210</sup> Ibid.

<sup>211</sup> Mark D Rosen, 'Liberalism and Illiberalism: Illiberal Societal Cultures, Liberalism, and American Constitutionalism' (2002) 12 *Journal of Contemporary Legal Issues* 815.

positions and offices open to all under conditions of fair equality of opportunity', which is also called the 'difference principle'.<sup>212</sup>

Whilst the first principle is about individual liberty, which Rawls views as a necessity for a just society, the second principle outlines what liberal equality should look like. Liberal equality, in Rawls's perception, can include inequalities because of their 'incentive effects'.<sup>213</sup> Such incentive effects have the tendency to 'promote productivity, which, if suitably regulated and taxed, can make everyone better off'.<sup>214</sup> Although, these principles hold up equality for all, they also allow for inequalities under certain circumstances. In the event that inequalities do benefit the least advantaged, political liberalism allows for them.

Given the scenario that racial minorities and women are discriminated against in subtle ways in the job market, these groups would seem to be the 'least advantaged' in regards to employment matters. Therefore, affirmative action, which could be regarded as a means of bestowing social and economic inequalities on people that do not benefit from these measures (by losing out on job opportunities), could be acceptable because they would benefit the least advantaged (women and minorities) regarding employment issues.

The view that affirmative action could be accommodated by political liberalism depends also on the liberal way of thinking about group rights. Will Kymlicka, a liberal who advocates cultural minority rights in liberal democratic societies, believes that group rights like affirmative action are compatible with the liberal idea of justice. He claims that 'many liberals, particularly on the left, have made an exception in the case of affirmative action for disadvantaged racial groups', because in their view it has the potential as a temporary measure to 'move [people] more rapidly towards a "colour-blind" society'.<sup>215</sup> Affirmative action can be regarded as 'demands ... within the mainstream economy, [which] are

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<sup>212</sup> Rawls, above n 199, 271.

<sup>213</sup> Bruce M Landesman, 'The Responsibilities of the Liberal State: Comprehensive versus Political Liberalism' (2010) *Utah Law Review* 175.

<sup>214</sup> Ibid.

<sup>215</sup> Kymlicka, above n 188, 4.

evidence of a desire to integrate into the institutions of the larger society'.<sup>216</sup>

Kymlicka states further that:

[S]omehow many contemporary liberals have acquired the belief that minority rights are inherently in conflict with liberal principles. Liberals today insist that the liberal commitment to individual liberty precludes the acceptance of collective rights, and that the liberal commitment to universal (colour-blind) rights precludes the acceptance of group-specific rights. But these bald statements are no part of the liberal tradition. Few if any liberals, until very recently, supposed that liberal principles allowed only universal individual rights. What contemporary liberals take to be well-established liberal principles are in fact novel additions to the liberal canon.<sup>217</sup>

Even though Kymlicka argues in order to support rights for multicultural citizens regarding their own cultural identity, his statement can also be applied to the liberal debate over affirmative action, which are group rights for historically disadvantaged groups.

Kymlicka believes that the reasons for the changed liberal view on group rights can be found in a 'post-war liberal consensus against group-differentiated rights for ethnic and national groups', which is based on the over-generalization of three factors that include a 'fear about international peace, a commitment to racial equality, and a worry about the escalating demands of immigrant groups'.<sup>218</sup> Therefore, the liberal way of thinking about equality has shifted over time to the exclusion of minority rights as being 'inherently unjust' and being 'a betrayal of liberal equality'.<sup>219</sup> In contrast, Kymlicka believes in the original and traditional liberal way of thinking about equality, which includes the belief that 'individual freedom is tied to membership in one's national group, and that group-specific rights [like affirmative action] can promote equality between the minority and the majority'.<sup>220</sup>

Political liberalism has the potential to support the implementation of affirmative action on grounds of remedying past discrimination and balancing the effects of such former discriminatory behaviour by helping the least advantaged of society.

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<sup>216</sup> Ibid 67-8.

<sup>217</sup> Ibid 68.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid 69.

<sup>220</sup> Ibid.

Affirmative action is a means to achieve a more just political community in the present and for the future.

Given that the determination of what is required of justice in the political community is the exercise of public reason, political liberalism is not satisfied with a static justification for policy responses to inequality. Affirmative action needs continual justification as a response to injustice. As the circumstances surrounding the discrimination against minorities changes, so does the ground for policy responses to assist them. Imposing limits to affirmative action policies and monitoring their progress is therefore central to their justification for the political liberal.

### ***C. Egalitarian Liberalism and Affirmative Action***

Whilst egalitarianism focuses on the enhancement of equality within society by attempting to decrease social inequalities as well as economic inequalities, the political theory of liberalism focuses on individual freedom and autonomy.<sup>221</sup> Egalitarian liberalism is a political theory that attempts to merge the core values of egalitarianism and liberalism.<sup>222</sup> Some people criticise this union because they perceive the values of equality and freedom to be contradictory.<sup>223</sup>

The development of equality as a political value can be traced back to ancient Greece, and then through the Enlightenment,<sup>224</sup> whose ideology was given a more radical character under the socialism of the nineteenth century,<sup>225</sup> to today's so-called luck egalitarianism, which has been promoted by Ronald

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<sup>221</sup> Will Kymlicka, 'Civil Society and Government: A Liberal-Egalitarian Perspective' in Nancy L Rosenblum and Robert C Post (eds) *Civil Society and Government* (Princeton University Press, 2002) 79.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Zafirovski states that 'In conjunction and mutual reinforcement with liberty and the sanctity of human individuals and their life – and happiness-defining individualism, equality, inclusion, and justice are constitutive values and institutions, or givens, in modern Western democratic and other societies ... [which] are essentially and primarily the ideals and legacies of the Enlightenment ... the Enlightenment creates ... the most open, powerful, and consistent project and formulation of the democratic idea of equality or socio-political egalitarianism within Western and other society during its history'. Zafirovski, above n 173, 43-4.

<sup>225</sup> Socialism, as a radical version of egalitarianism, 'must confront the objection that, even if in principle economically feasible, it cannot be realized because of the conflict it implies with entrenched human motivations'. Alex Callinicos, *Equality* (Polity Press, 2000) 123.

Dworkin, and G A Cohen.<sup>226</sup> Luck egalitarianism promotes the idea that bad luck or involuntary circumstances should be taken into consideration by distributive justice, in contrast to voluntary bad choices or circumstances of individuals that are caused by their own actions.<sup>227</sup>

Over time, egalitarian core values have developed from the ‘old egalitarianism’, which concerned itself with its doubts about economic dynamism in regards to the redistribution of wealth, to the pursuit of equality of citizens’ social status through ‘removing class distinctions’.<sup>228</sup> The ‘new egalitarianism’ embraces ‘a flexible and dynamic economy’ in order to ensure fair economic redistributions and the chance of equal opportunities for all.<sup>229</sup>

Egalitarians criticise the unjust distribution of resources in contemporary societies. They are ‘shocked by the contrast between the equal dignity of all human beings and their unequal resources’.<sup>230</sup> This egalitarian perception is based on the belief that the distribution of resources in most societies ‘does not match the claims and deserts of the recipients’.<sup>231</sup>

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<sup>226</sup> Samuel Bowles, and Herbert Gintis, ‘Recasting Egalitarianism’ in Samuel Bowles and Herbert Gintis (eds) *Recasting Egalitarianism: New Rules for Communities, States and Markets* (Verso, 1998) 361. See also Henry Phelps Brown, *Egalitarianism and the Generation of Inequality* (Oxford University Press, 1991) 15-262; Carl Knight, *Luck Egalitarianism: Equality, Responsibility, and Justice* (Edinburgh University Press, 2009) 1-250.

<sup>227</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002, Reprint) 287. Dworkin further states about principles of social justice that ‘The first principle holds that it is objectively important that any human life, once begun, succeed rather than fail – that the potential of that life be realized rather than wasted – and that this is equally objectively important in the case of each human life. I say “objectively” important to emphasize that the success of a human life is not important just for the person whose life it is or for those close to him. We all have a reason to care about the fate of any human life, even that of a stranger, and to hope that it will be a successful life. The second principle acknowledges this objective importance, but insists nevertheless that one person – the person whose life it is – has a special responsibility for each life, and that in virtue of that special responsibility he or she has a right to make the fundamental decisions that define, for him, what a successful life would be. If we take these two principles of ethical individualism as fundamental guides in constructing a theory of political morality, it will be an egalitarian theory, because it will insist that government must treat the life of each person it governs as having great and equal importance, and construct its economic and other structures and policies with that egalitarian principle in mind, and it will be also a liberal theory, because it will insist that government must leave people finally free to make decisions that set the parameters of success for their own lives for themselves’: at 448-9.

<sup>228</sup> Patrick Diamond, and Anthony Giddens, ‘The New Egalitarianism: Economic Inequality in the UK’ in Patrick Diamond et al. (eds) *The New Egalitarianism* (Polity Press, 2005) 106.

<sup>229</sup> Ibid.

<sup>230</sup> Henry Phelps Brown, *Egalitarianism and the Generation of Inequality* (Oxford University Press, 1991) 501.

<sup>231</sup> Ibid 502.

In general, the distribution of resources depends on a free democratic market in which the free choice of people to acquire services and goods in accordance to their own needs, wishes and desires determines how resources are distributed.<sup>232</sup> Hence, how much a person earns depends strongly on their position in the free market system, and has often nothing to do with how much they work, or how much they contribute positively to society. For example, a community worker, who spends his whole life serving the underprivileged, earns in general a lot less than someone who just made a fortune by speculating in shares.<sup>233</sup> Such an unequal outcome in the distribution of resources is perceived as unjust by egalitarians, whose most important core value is to achieve more equality within society through an egalitarian redistribution of resources.

Egalitarians acknowledge that '[i]n principle ... individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck [like genetic diseases etc], but not from those that should be seen as flowing from their own choices'.<sup>234</sup> Cohen defines the 'right reading of egalitarianism' as the 'purpose ... to eliminate involuntary disadvantage ... for which the sufferer cannot be held responsible'.<sup>235</sup> Hence, features like race and gender fall under the category of involuntary disadvantage, if they are the reason for being discriminated against. Such involuntary disadvantages include, for example, being exposed to racial and gender stereotypes in employment; and less educational opportunities due to historical discrimination of certain social groups.<sup>236</sup> These involuntary disadvantages lead to a lack of racial and gender

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Dworkin, above n 227, 287. Luck egalitarianism is being challenged, inter alia, by Elisabeth Anderson, who states that 'Desert-catering luck egalitarians have focused on individually-allocating rules, in an attempt to ensure that no one is disadvantaged due to undeserved bad luck. But markets cannot operate efficiently unless prices are allowed to vary in response to mere luck. Nor should we authorize the state to correct market distributions in accordance with any standard of desert ... I urge a return to the original ideal of egalitarianism, which is a conception of equality in social relations among members of society. This ideal, in conjunction with knowledge and plausible conjecture about the causal implications of different distributions, helps us construct rules that constrain the range of permissible income variations'. Elisabeth Anderson, 'How Should Egalitarians Cope With Market Risks?' (2008) 9 *Theoretical Inquiries in Law* 270; see also Nir Eyal, who argues that 'luck egalitarianism is false, in particular ... that disadvantages that result from perfectly free choice can constitute egalitarian justice'. Nir Eyal, 'Egalitarian Justice and Innocent Choice' (2007) 2 *Journal of Ethics & Social Philosophy* 1.

<sup>235</sup> G A Cohen, 'On the Currency of Egalitarian Justice' in Michael Otsuka (ed) *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (Princeton University Press, 2011) 13.

<sup>236</sup> Ibid.

diversity in employment, which is not acceptable in multi-cultural societies of today that aim to achieve an equal distribution of opportunities for a diverse range of people.

This egalitarian view seems to allow for affirmative action, which redistributes, for example, employment opportunities to those who are involuntarily disadvantaged. This view seems also to be supported by egalitarian core values that embrace social solidarity and the direct interrelation between rights and responsibilities of citizens. This means that from an egalitarian point of view, welfare benefits should ‘depend not only on a person’s means but also on his or her behaviour’.<sup>237</sup> This way of thinking favours the idea of compensating people for circumstances that are not caused by their own ‘fault’, for example, being a member of a historically disadvantaged group.

The relation between individual actions and distributive justice is also addressed by so-called ‘luck egalitarians’. Luck egalitarians, such as Dworkin, raise the question of ‘when and how far is it right, that individuals bear the disadvantages or misfortunes of their own situations themselves, and when is it right, on the contrary, that ... the community ... relieve them from or mitigate the consequences of these disadvantages?’.<sup>238</sup> This formula could be applied to historically disadvantaged groups by asking whether or not they should be left on their own to deal with racial and gender discrimination, or whether or not society should help them alleviate their involuntary disadvantage.

When egalitarianism is linked to liberalism, the egalitarian emphasis on correcting social inequality must be reconciled with the liberal emphasis on individual freedom and small government.<sup>239</sup> Kymlicka notes that ‘the vast majority of liberal theorists and practitioners are concerned to reconcile these emphases, which leads him to the conclusion that ‘many of these in-between liberals can plausibly be categorized as liberal egalitarians’.<sup>240</sup> Political

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<sup>237</sup> Diamond and Giddens, above n 228, 107.

<sup>238</sup> Dworkin, above n 227, 287.

<sup>239</sup> Will Kymlicka, ‘Civil Society and Government: A Liberal-Egalitarian Perspective’ in Nancy L Rosenblum and Robert C Post (eds) *Civil Society and Government* (Princeton University Press, 2002) 79-80.

<sup>240</sup> Ibid. Kymlicka further elaborates that ‘William Galston, Michael Walzer, and Mickey Kaus are all recent examples of liberals who appeal to a robust notion of the equal moral status of

liberalism faces the same task of reconciliation and is closely related to egalitarian liberalism for this reason.<sup>241</sup>

The question remains whether or not egalitarian liberalism is able to accommodate the implementation of affirmative action. The answer depends on its view of equality and distributive justice. Egalitarian liberalism can only justify a liberal state if it 'promote[s] egalitarian social norms' within society.<sup>242</sup>

The focus on substantive equality is stronger for egalitarian than political liberals. Inequality on the basis of race, gender and class are all unacceptable. The egalitarian view demands that each person is treated with the same concern and respect irrespective of superficial differences. Consequently, the removal of the existing inequalities between the members of such a society seems to be the elimination of discrimination, which also includes the redistribution of resources and opportunities, and therefore wealth and social status. Egalitarians claim that 'by more equally distributing money, political power, employment, and education, members of society become more equal'.<sup>243</sup> Of course, this means taking resources and opportunities from some people and giving them to others. A further step is not only to redistribute the actual resources and opportunities, but also to create new opportunities for certain people to enhance their potential to get resources in the future. One way of achieving this is through affirmative action.

The egalitarian view accepts the use of gender and race as decisive factors to enhancing equality by 'placing [disadvantaged minorities] in a better competitive position with the advantaged majority'.<sup>244</sup> In general, egalitarian liberals are concerned with equal opportunities as 'equality of conditions and actual life chances, not simply equality of abstract or nominal opportunity', of which the

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human beings, and who insist that the state must treat citizens as equals, but who deny that this requires equality of resources': at 80.

<sup>241</sup> Paula England, *Comparable Worth: Theories and Evidence* (Walter de Gruyter, 1992) 263.

<sup>242</sup> Steven M Young, 'Beyond Neutrality' (1999) 49 *University of Toronto Law Journal* 153, 157; Michael Walzer, *Politics and Passion: Toward a more Egalitarian Liberalism* (Yale University Press, 2006) 89.

<sup>243</sup> John C Duncon Jr, 'Two Wrongs Do/Can Make a Right: Remembering Mathematics, Physics & Various Legal Analogies – The Law Has Made Him Equal, But Man Has Not' (2005) 43 *Brandeis Law Journal* 555.

<sup>244</sup> *Ibid* 555-6.



former would be in line with affirmative action.<sup>245</sup> Hence, the egalitarian liberal view can be regarded as supportive of affirmative action as the egalitarian liberal idea of social justice embraces the redistribution of the ‘balance of opportunities and life chances in favour of those lower down the scale’.<sup>246</sup>

This view is endorsed by Fran Ansley, who states that ‘much of the actual support for affirmative action flows from and is refreshed by egalitarian traditions that see colour-conscious programs as a welcome aid to greater fairness now and in most imaginable futures’.<sup>247</sup> Such egalitarian liberal traditions include the idea of the importance of general access to employment and education, in order to enhance ‘people’s ability to participate meaningfully in civic and political life’.<sup>248</sup>

Affirmative action is an obvious legal response to inequality for egalitarian liberals. Furthermore, it is imperative to take positive measures and to ensure their success because of concern with equality outcomes. On the other hand, egalitarian liberals would be sensitive to claims of reverse discrimination, which would be unacceptable in an egalitarian society. Consequently, the achievement of the objective of substantive equality under egalitarian liberalism must lead to the termination of the application of affirmative action, when its goals are achieved.

#### ***D. Communitarian Liberalism and Affirmative Action***

The communitarian way of thinking focuses on the relationship between the individual and the community as a whole, whilst emphasizing the responsibilities of individuals towards their communities.<sup>249</sup> Robert Bellah describes four basic

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<sup>245</sup> Fran Ansley, ‘Affirmative Action: Diversity of Opinion – Classifying Race, Racializing Class’ (1997) 68 *University of Colorado Law Review* 1021.

<sup>246</sup> Diamond and Giddens, above n 228, 108.

<sup>247</sup> Ansley, above n 245, 1021.

<sup>248</sup> *Ibid* 1022.

<sup>249</sup> The political ideas regarding communitarianism have been developed during the history of human mankind, with their earliest roots in the Bible, and in ancient Greece by Aristotle, who compared social life in small and large communities with each other, but the concept itself was first defined by John Goodwin Barmby in 1841, who also established the so-called Universal Communitarian Association. Amitai Etzioni (ed), *The Essential Communitarian Reader* (Rowman & Littlefield, 1998) ix. Communitarianism began to rise in popularity by the end of the 20<sup>th</sup> century, especially, when the persistent communitarian critique of liberalism reached a new peak during the 1980s. Paul van Seters, ‘Communitarianism in Law and Society’ in Paul van

values of communitarianism<sup>250</sup> as the belief that individuals are deeply rooted and depend strongly on their communities, the importance of solidarity within communities, the positive notion of belonging to multiple communities – from being the member of a family to being a world citizen – and finally, the necessity of the ‘right and duty’ of community participation.<sup>251</sup> Amitai Etzioni regards ‘shared formulations of the good’ as essential, which in his opinion should ‘entail particularistic moral obligations to and for the members of the communities involved’.<sup>252</sup> He sets as an example ‘that one ought to cherish one’s ethnic heritage’, which ‘entails “do’s” and “don’ts” for and to members [of this particular ethnic heritage], but not for others’.<sup>253</sup>

The emphasis on these normative obligations leads to the question of what exactly constitutes the common good for communitarians.

Generally, the aim of the communitarian common good is to establish inclusive communities that ought to be based on ‘three communitarian principles which deal, respectively, with co-operative enquiry, mutual responsibility, and citizen

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Seters (ed) *Communitarianism in Law and Society* (Rowman & Littlefield, 2006) 1; see also Michael Walzer, and David Miller, *Thinking Politically: Essays in Political Theory* (Yale University Press, 2007) 96; Scott Cummings, ‘Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a Colour-Conscious Theory’ (1997) 13 *Harvard Blackletter Journal* 10.

<sup>250</sup> Besides true communitarians, like Amitai Etzioni, Beau Breslin and Daniel A Bell, many scholars can be found who do not claim to be communitarians themselves, but who do support elements of the communitarian theory, for example, Alasdair Mac Intyre, Michael J Sandel, Charles Taylor, and Michael Walzer. Bell states that ‘Alasdair MacIntyre, Michael Sandel, Charles Taylor, and Michael Walzer – have yet to identify themselves with the ‘communitarian movement’ ... What does unite them, however, is the view that liberalism does not sufficiently take into account the importance of community for personal identity, moral and political thinking, and judgments about our well-being in the contemporary world’. Daniel A Bell, *Communitarianism and its Critics* (Oxford University Press, 1993, Reprinted 2004) 4. See also Amitai Etzioni (ed), *The Essential Communitarian Reader* (1998) ix; Paul van Seters, ‘Law and Communitarianism: Constraints and Opportunities’ in Paul van Seters (ed) *Communitarianism in Law and Society* (2006) vii-x. Altogether, there is not only one communitarian theory, but several, which are only discussed in this chapter on the basis of their shared characteristics in regards to the general communitarian view on affirmative action. The various communitarian theories include, inter alia, substantive or conservative communitarianism, democratic participatory-republican communitarianism, liberal communitarianism, egalitarian communitarianism, and universal communitarianism. Winfried Brugger, ‘Communitarianism as the Social and Legal Theory Behind the German Constitution’ (2004) 2 *International Journal of Constitutional Law* 436.

<sup>251</sup> Robert N Bellah, ‘Community Properly Understood: A Defense of Democratic Communitarianism’ in Amitai Etzioni (ed), *The Essential Communitarian Reader* (1998) 18-9.

<sup>252</sup> Amitai Etzioni, *The Common Good* (2004) 7-8.

<sup>253</sup> *Ibid.*

participation'.<sup>254</sup> Communitarian co-operative enquiry claims to be the 'key to identifying specific beliefs and values on which to anchor a strong community life'.<sup>255</sup> As a consequence, communitarians believe that such a co-operative enquiry will lead to the establishment of common values, which have then to be pursued by all members of society through the principle of mutual responsibility.<sup>256</sup>

In addition, citizens are required to support the implementation of those common values by the principle of citizen participation, which 'requires that all those affected by any given power structure are able to participate as equal citizens in determining how the power in question is to be exercised'.<sup>257</sup> The power structures exist at many levels of community organisation from neighbourhood communities, to local authorities, to federal authorities.<sup>258</sup> Overall, in order to establish a good society, communitarians attempt to create a 'balance between individual rights and social responsibilities, between autonomy and the common good'.<sup>259</sup>

Communitarians are critical of liberal thinking because it has a negative impact on the solidarity of people. The impact on solidarity is caused by the disconnection of people from each other, or 'asocial individualism'.<sup>260</sup> This social disconnection occurs because of 'the liberal ability to distance ourselves from our ends', which 'leads to a lack of communal sentiment or civic spirit'.<sup>261</sup>

Joseph Raz, Charles Taylor, and Michael Sandel all argue that people and their interests cannot be separated from the societies in which they reside. People cannot therefore choose to reject social relations, or only form them in order to 'further [their] own predetermined (exogenous) interests and values'.<sup>262</sup> Raz and

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<sup>254</sup> Henry Benedict Tam, *Communitarianism – A New Agenda for Politics and Citizenship* (New York University Press, 1998) 12-3.

<sup>255</sup> Ibid 13-4.

<sup>256</sup> Ibid 14.

<sup>257</sup> Ibid 16-7.

<sup>258</sup> Ibid.

<sup>259</sup> Etzioni, above n 252, xi.

<sup>260</sup> Andrew J Cohen, 'Liberalism, Communitarianism, and Asocialism' in Jan Narveson and Susan Dimock (eds) *Liberalism: New Essays on Liberal Themes* (2000) 101.

<sup>261</sup> Ibid 102.

<sup>262</sup> Stephen A Gardbaum, 'Law, Politics, and the Claim of Community' (1992) 90 *Michigan Law Review* 692.

Taylor argue that this view of the position of the individual in society is compatible with liberalism.<sup>263</sup>

The communitarian idea of equality is embedded in the communitarian common value of justice.<sup>264</sup> This entails ‘being fairly treated by others’, including ‘being able to relate to others without any sense of discrimination or subjugation’, as a consequence of the knowledge ‘that reciprocal relationships are respected’.<sup>265</sup> Even though communitarians regard people as morally equal to one another, they also acknowledge that people can differ from each other in regards to their ‘talents, in contributions, in authority, in power’ as well as ‘in valid claims to rewards and resources’.<sup>266</sup> Nevertheless, the acknowledgement of such social differences amongst people does not preclude the communitarian belief that ‘moral equality is at the heart of justice’.<sup>267</sup>

Communitarians aim to establish healthy communities in which people develop strong community ties by identifying personally with their communities. This includes the belief that people need to feel ‘welcome and cared for’ by their communities and each other. Racial and gender discrimination are unacceptable in this context. Racial and gender discrimination contribute to socioeconomic inequalities in communities, which have the potential to ‘[u]ndermine civic participation and the sense of community shared by members of the broader society’.<sup>268</sup> Socioeconomic inequality can further lead to ‘elevated levels of segregation along socioeconomic lines’ and represents ‘a serious undermining of the potential for the development of the kind of communities and participation in civil society to which communitarianism aspires’.<sup>269</sup> For example, vast socioeconomic differences influence detrimentally how people live in regards to ‘housing patterns that tend to limit participation in the wider society’.<sup>270</sup>

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<sup>263</sup> Ibid 693.

<sup>264</sup> Michael Walzer, ‘The Communitarian Critique of Liberalism’ (1990) 18 (1) *Political Theory* 16-21.

<sup>265</sup> Tam, above n 254, 15.

<sup>266</sup> Philip Selznick, ‘Social Justice: A Communitarian Perspective’ in Amitai Etzioni (ed), *The Essential Communitarian Reader* (1998) 63.

<sup>267</sup> Ibid.

<sup>268</sup> Richard Coughlin, ‘Does Socioeconomic Inequality Undermine Community? Implications for Communitarian Theory’ in Amitai Etzioni, Drew Volmert, and Elanit Rothschild (eds) *The Communitarian Reader: Beyond the Essentials* (Rowman & Littlefield, 2004) 118.

<sup>269</sup> Ibid 125.

<sup>270</sup> Ibid 124.

Communitarians believe in the necessity of subordinating values such as ‘materialism and individualism ... to communal values and the communal good’.<sup>271</sup> Communitarians embrace freedom and equality from a communal point of view rather than from an individualistic one. The communitarian understanding of equality emphasises the idea that people in general are obligated to help those who have less, including those who ‘suffer or are degraded because they are oppressed and impoverished’ as well as those people ‘who are in danger of being despised and excluded’, because such conditions expose people to being rejected ‘as objects of moral concern’, which would interfere negatively with the communitarian idea of a caring and just community.<sup>272</sup>

With this view of equality, affirmative action is a legitimate response to inequality as it secures ‘a legitimate moral and public purpose [by] overcoming prejudice and opening opportunities’.<sup>273</sup> The concern is for equality within the community as a whole and not individuals within it. Therefore, communitarians are prepared to disadvantage an individual for the greater goal of equality in the community. People who are not included as beneficiaries of affirmative action are not regarded as socially subjugated ‘outcasts’, but as socially more privileged people who help to restore the social balance by allowing these policies to restore more equal opportunities for minority groups and women. Communitarians believe in the importance and necessity of providing social justice by remedying ‘the most important effects of domination and impoverishment’ in order to satisfy ‘everyone’s basic needs for life, health, liberty, and hope’.<sup>274</sup>

Furthermore, there could be another justification for the implementation of affirmative action under communitarianism. Affirmative action not only aims to alleviate the detrimental effects of historical racial and gender discrimination, but also to promote diversity.<sup>275</sup> In the event that the promotion of diversity would

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<sup>271</sup> Phillip J Closius, ‘Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action’ (1995) 74 *Nebraska Law Review* 600.

<sup>272</sup> Selznick, above n 266, 64.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Michael J Sandel, *Justice: What’s the Right Thing to Do?* (Penguin Books Limited, 2009) 169.

be in line with the communitarian communal good, affirmative action could be of interest for communitarians.

Sandel explores the rationale of promoting diversity against the background of affirmative action in higher education. He concludes that the ‘diversity rationale is an argument in the name of the common good’.<sup>276</sup> Sandel argues that ethnic or racial diversity in student bodies widens the cultural horizon of students, and helps society to develop future leaders of all backgrounds, which would further the development of a multi-cultural society as such.<sup>277</sup>

In this view, the implementation of affirmative action to promote diversity is compatible with communitarianism. Sandel claims that the effect of reverse discrimination against the individual student, who does not qualify for affirmative action, ‘would not carry much weight’ in contrast to the common good that could be achieved by affirmative action for society as such.<sup>278</sup> In this view, the implementation of affirmative action to promote diversity is compatible with communitarianism.

Sandel’s view on affirmative action can also be applied to employment matters. The promotion of diversity in employment can be justified in a multi-cultural society by the need for representation of all racial groups in a variety of jobs to reflect and acknowledge their presence and contribution to society. Multi-cultural societies, like the United States, Canada, and Australia, have therefore a need to advance the integration of minority groups and women, which could be furthered by the implementation of affirmative action under communitarianism. The diversity rationale is in line with the communal spirit and its aim of personal identification with its members.

Affirmative action takes a wider view of society which is consistent with communitarian ideals. Instead of only focusing on an individual’s situation, the welfare of whole groups in society is taken into account. Responses to disadvantage or discrimination in employment must therefore serve a genuine community need. To do so, these community needs must be identified and the

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<sup>276</sup> Ibid 171.

<sup>277</sup> Ibid 171-2.

<sup>278</sup> Ibid 173.

affirmative action response justified in relation to them. As with the dynamic nature of public reason in political liberalism, the constitution of the community and the sites of injustice within it are not static. Any policy aimed at addressing inequality and injustice must be constantly assessed against the communities' constitution and the needs of its members. In relation to affirmative action, it is necessary to constantly monitor whether they are responding to a community need.

### **III. CONCLUSION**

The political theories discussed in this chapter all have their unique way of thinking about freedom, equality and distributive justice. The investigation of liberalism in its various forms has presented a range of liberal ways of thinking about the implementation of affirmative action, of which only classical liberalism completely rejected its implementation. Interestingly, all other forms of liberalism, namely political liberalism, egalitarian liberalism, and communitarian liberalism, seemed to be compatible with the use of affirmative action for different reasons.

It has also been revealed, that the liberal way of thinking about equality, and consequently also the acceptance of policies like affirmative action, has shifted over time from a classical liberal view of rejecting them as illiberal, to the more social liberal view of tolerating, and even embracing group rights for women and minorities. As soon as liberalism is merged with other political concepts such as egalitarianism and communitarianism, the liberal core values of freedom and autonomy remain, but are supplemented with other values which focus on equality within the political community and have the capacity to accommodate group rights through affirmative action.

There is scope for affirmative action in most of the branches of liberalism investigated, but all of the political theories investigated require that affirmative action policies be tailored to achieving a social or political goal with the least

affect on individual freedom and autonomy. Political liberalism can only accommodate these policies as long as remedying historical injustice is still necessary. Egalitarian liberalism has to terminate the application of affirmative action when substantive equality is achieved. Communitarian liberalism only supports affirmative action as long as it contributes to justice in the community.

Overall, affirmative action can only be allowed as long as it is truly necessary to fulfil the goals of the different political theories investigated. Therefore, one of the key factors for the implementation of affirmative action is the need to monitor its success in order to determine at what point in time its goals are achieved. The following chapters investigate the implementation of affirmative action in the United States, Canada and Australia with a focus on how these countries construct, measure and determine the limits for specific affirmative action programs in the workplace.



## **CHAPTER FOUR**

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### **THE LIMITS OF AFFIRMATIVE ACTION IN THE UNITED STATES**

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## I. INTRODUCTION

Freedom is the right to share, share fully and equally, in American society – to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others. But freedom is not enough. 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, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up 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. Thus it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result ... to this end equal opportunity is essential, but not enough, not enough.<sup>279</sup>

These words are part of a speech President Lyndon B. Johnson gave at Howard University to African-American graduates in June 1965. Three months afterwards, in the light of his speech, Johnson issued *Executive Order 11246*, requiring government contractors and subcontractors to implement affirmative action.<sup>280</sup> Johnson’s speech explains the justification for affirmative action policies in the United States; namely, that legal equality is not enough to raise historically disadvantaged members of society to the same level as others in the community, but indicates that measures like affirmative action are necessary to achieve substantive equality. *Executive Order 11246* was regarded as necessary by the United States government, because despite existing anti-discrimination legislation, federal contractors largely refused to employ African-Americans.<sup>281</sup> Therefore, as Johnson pointed out in his speech, equal opportunity is not enough, because there is also the need to ensure that historically disadvantaged groups have the chance to compete on an equal level within society. In order to achieve this goal, affirmative action policies have been established, which were

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<sup>279</sup> President Lyndon B Johnson, *Commencement Address at Howard University: To Fulfil These Rights* (June 4, 1965).

<sup>280</sup> *Executive Order 11246* (EO 11246) was issued on 24 September 1965 and is investigated further in a later part of this chapter.

<sup>281</sup> Vicki J Limas, ‘Sovereignty as a Bar to Enforcement of Executive Order 11,246 in Federal Contracts with Native American Tribes’ (1996) 26 *New Mexico Law Review* 259. See also Neal E Devins, ‘Civil Rights Hydra’ (1991) 89 *Michigan Law Review* 1735.

originally intended only to be applied to federal government employees, but were later used in the private sector and in higher education.<sup>282</sup> 50 years after their first introduction, questions about the constitutionality of affirmative action and doubts about the necessity of its implementation still cause passionate debates in the US.<sup>283</sup>

This chapter reveals the contrast between the original intent to establish temporary limited and goal oriented affirmative action policies, and the reality that limits have not been set. The lack of limits has caused problems for the public acceptance and application of these policies in the United States.

The quest for equality in America began over 100 years ago with the abolition of slavery by the 13<sup>th</sup> Amendment of the *United States Constitution* on 6 December 1865, the introduction of the *Civil Rights Act of 1866*, which guarantees equal rights to every person in the United States ‘without distinction of race, or colour, or previous condition of slavery or involuntary servitude’,<sup>284</sup> and the passing of the 14<sup>th</sup> Amendment of the *Constitution* in 1868, which guarantees for all persons ‘the equal protection of the laws’.<sup>285</sup> Affirmative action in the 20<sup>th</sup> century represents the latest chapter in this unfinished history of the quest for social equality in the United States.

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<sup>282</sup> Rafael A Seminario, ‘The Uncertainty and Debilitation of the Marks Fractured Opinion Analysis – The Supreme Court Misses an Opportunity: *Grutter v Bollinger*’ (2004) *Utah Law Review* 741.

<sup>283</sup> See Chapter 2.

<sup>284</sup> *Civil Rights Act of 1866*, ch31, § 1, 14 Stat 27, 27 (1866) as amended by 42 USC §§ 1981 and 1982; Section 1 states that ‘[All] persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and colour, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding’. The *Civil Rights Act of 1866* ‘was enacted to enforce the 13<sup>th</sup> Amendment’, in order to achieve ‘practical freedom for the freedmen’ by resolving ‘[a] serious practical problem: how to construct and implement a new labour system that was contrary to the deepest and most long-standing mores, customs, and practices of the South, the strength of which depended not simply, or even principally, on law, but on the most deeply held values of white society’. Barry Sullivan, ‘Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981’ (1989) 98 *Yale Law Journal* 3, 556, 564.

<sup>285</sup> *United States Constitution* amend XIV § 1, which was passed by Congress on 13 June 1866 and was ratified on 9 July 1868.

The population of the United States includes ‘virtually every national, racial, ethnic, cultural and religious group in the world’.<sup>286</sup> Whilst the non-White population is rapidly increasing, it is estimated that the White non-Hispanic population will steadily decline to 50.1 percent of the overall population in 2050.<sup>287</sup> Discrimination is prohibited by the *U.S. Constitution* and federal laws in all areas of social life, including employment, and affirmative action policies are implemented as part of the fulfilment of the United States’ obligations under *CERD* to achieve social equality.<sup>288</sup> These policies are implemented by, for example, executive orders to enhance non-discrimination in government contracting and sub-contracting. Affirmative action is regarded as a means to ‘remedy the effects of past and present discrimination’ without the use of ‘numerical straightjackets’ like quotas, and aims at the promotion of fair employment and the use of narrowly tailored measures to enhance employment opportunities for minorities.<sup>289</sup>

However, since 1996, there have been a series of public ballots in States of the US on whether to repeal affirmative action policies in public education, public employment and public contracting.<sup>290</sup> All the ballots successfully opposed affirmative action and led to the implementation of amendments to the federal constitutions of the states involved, which now explicitly prohibit the use of preferential treatment (affirmative action) by state legislators.<sup>291</sup> These ‘anti-

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<sup>286</sup> United Nations, *CERD*, Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention CERD/C/USA/6* (1 May 2007), 5.

<sup>287</sup> *Ibid* 6.

<sup>288</sup> The United States ratified *CERD* on 21 October 1994 (after having signed it on 28 September 1966), see also Chapter 1 III and Chapter 2 III C of this thesis.

<sup>289</sup> United Nations, *CERD*, Committee on the Elimination of Racial Discrimination, above n 285, 46-7. The term ‘narrowly tailored’ is elaborated in detail in part II of this Chapter.

<sup>290</sup> In 1996, a series of public ballots started with California’s Proposition 209, followed by the Washington Initiative 200 in 1998, Michigan’s Proposal 2 in 2006, and Nebraska’s Initiative 424 in 2008. Other public ballots were launched in Arizona, Colorado, Missouri and Oklahoma in 2008 by Ward Connerly (a passionate opponent of affirmative action policies) and his American Civil Rights Initiative, but remained unsuccessfully. Reginald T Shuford, ‘Why Affirmative Action Remains Essential in the Age of Obama’ (2009) 31 *Campbell Law Review* 508.

<sup>291</sup> *Constitution of the State of California*, art 1, § 31(a); *Constitution of the State of Michigan*, art 1, § 26(2); *Constitution of the State of Nebraska*, art 1, § 30; *Revised Code of Washington § 49.60.400(1)* (1999), which all state that ‘The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, colour, ethnicity, or national origin in the operation of public employment, public education, or public contracting’. See also Michael E Rosman, ‘Challenges to State Anti-Preference Laws and the Role of Federal Courts’ (2010) 18 *William and Mary Bill of Rights Journal* 709-14.

affirmative action’ amendments violate federal law<sup>292</sup> and the *United States Constitution*.<sup>293</sup> The Supreme Court has interpreted the Fourteenth Amendment as allowing for affirmative action measures that are narrowly tailored and serve a compelling state interest.<sup>294</sup> Nevertheless, these ‘anti-affirmative action laws’ have not been successfully challenged to date.<sup>295</sup> In 1997, a coalition of opponents of affirmative action argued against ‘anti-affirmative action laws’ in *Coalition for Economic Equity v Wilson*<sup>296</sup>, which included the claim that these laws violate the equal protection clause of the *Constitution*, and are pre-empted by *Title VII of the Civil Rights Act of 1964*. The Ninth Circuit Court of Appeals rejected this claim and the Supreme Court declined to review the decision.

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<sup>292</sup> Kimberly West-Faulcon, ‘The River Runs Dry: When *Title VI* Trumps State Anti-Affirmative Action Laws’ (2009) 157 *University of Pennsylvania Law Review* 1078; the author claims that ‘[t]o comply with these new voter-approved anti-affirmative action laws, public universities have eliminated their affirmative action policies, and this has had a negative impact on minority admission rates. At the same time, federal anti-discrimination law – *Title VI of the Civil Rights Act of 1964* and its implementing regulations – prohibits these universities from using selection criteria that have the effect of discriminating against applicants on the basis of race. Legal scholars have largely ignored this tension between state anti-affirmative-action laws and federal anti-discrimination law ... A major implication of these conclusions is that, although frequently accused of illegally favouring minorities using “under the table” affirmative action, affirmative action-less universities are admitting so few minorities that the racial disparities in admissions to those institutions establishes a rebuttable legal presumption of a *Title VI* disparate impact violation’: at 1078, 1082.

<sup>293</sup> See also Harvard Law Review Association, ‘The Constitutionality of Proposition 209 as Applied’ (1998) 111 *Harvard Law Review* 2081, which concludes that ‘[t]he Supreme Court’s precedents dictate that Proposition 209 cannot be applied constitutionally in certain situations. Proposition 209 does not restrict federal courts from granting preferential relief when authorized to do so by the *Constitution* or *Title VII*. Additionally, state courts hearing federal causes of action cannot impose limits on necessary federal remedies’: at 2098. See also Rosman, above n 291, 709-14.

<sup>294</sup> *Grutter v Bollinger*, 539 US 306 (2003), this case is discussed in a later section of this chapter.

<sup>295</sup> There have been challenges in California in 1997 and 2007 and in Michigan in 2006 and 2008. The cases in California are: *Coalition for Economic Equity v Wilson*, 110 F3d 1431 (9<sup>th</sup> Circuit 1997); *Coral Construction Inc v City and County of San Francisco*, 57 Cal Rptr 3d 781 (Cal Court of Appeal 2007); and the cases in Michigan are: *Coalition to Defend Affirmative Action v Granholm*, 473 F3d 237, 247 (6<sup>th</sup> Circuit 2006); *Coalition to Defend Affirmative Action v Regents of the University of Michigan*, 539 F Supp 2d 924 (E.D. Michigan 2008).

<sup>296</sup> 110 F3d 1431 (9<sup>th</sup> Circuit 1997); the case involves a coalition of affirmative action opponents who filed suit against an amendment of the California Constitution (article 1, section 31 which was based on the state ballot Proposition 209), which prohibits race and gender preferences. The claim includes that this prohibition is void in regards to the supremacy clause, which supposedly conflicts with the *Title VII of the Civil Rights Act of 1964* and the Equal Protection Clause of the Fourteenth Amendment of the *Constitution*. The United States District Court for the Northern District of California decided to grant a preliminary injunction to prevent California from implementing the provision involved. The state appealed and the Ninth Circuit Court of Appeals rejected the claim, vacated the preliminary injunction and remanded the case.

The Ninth Circuit Court stated that ‘*Title VII* by its plain language does not preempt Proposition 209’.<sup>297</sup> Furthermore, the Court denied that the ‘anti-affirmative action law’ involved violates the *Constitution*, stating that:

[t]he *Constitution* permits the people to grant narrowly tailored racial preference only if they come forward with a compelling interest to back it up ... In the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires ... To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.<sup>298</sup>

Moreover, the Court stated that even though ‘the *Constitution* permits the rare race-based or gender-based preference [this] hardly implies that the state cannot ban them altogether’, which also includes that ‘[s]tates are free to make or not to make any constitutionally permissible legislative classification’.<sup>299</sup> This outcome was followed by other cases,<sup>300</sup> which dealt with challenges in regards to ‘anti-affirmative action laws’, and resulted in similar court decisions supporting state initiatives that banned affirmative action.<sup>301</sup>

In 1999, Florida ended affirmative action in public education, public employment and public contracting through an executive order of its governor – *Executive Order 99-281*.<sup>302</sup> In Texas, affirmative action has been banned in higher education based on the federal court order in *Hopwood v Texas*,<sup>303</sup> in which affirmative action was not permitted to be used to achieve a diverse

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<sup>297</sup> Ibid 1431, 1448.

<sup>298</sup> Ibid 1431, 1446.

<sup>299</sup> Ibid.

<sup>300</sup> *Coral Construction Inc v City and County of San Francisco*, 57 Cal Rptr 3d 781 (Cal Court of Appeal 2007), in which the Court decided inter alia that the amendment article 1, section 31 of the California Constitution did not violate the US Constitution, but remanded the case regarding whether the affirmative action measure involved was narrowly tailored and designed to remedy pervasive racial discrimination in public contracting; *Coalition to Defend Affirmative Action v Granholm*, 473 F3d 237, 247 (6<sup>th</sup> Circuit 2006), in which the Court held, inter alia, that an amendment to the state *Constitution of Michigan*, which prohibits race and gender preferences, does not violate the *US Constitution*; *Coalition to Defend Affirmative Action v Regents of the University of Michigan*, 539 F Supp 2d 924 (E.D. Michigan 2008), in which the Court also upheld the amendment to the *Michigan State Constitution* supporting the prohibition of race and gender preferences.

<sup>301</sup> See also Rosman, above n 291, 709-14.

<sup>302</sup> *Executive Order 99-281* (1999), which was issued by Jeb Bush, the Governor of Florida, prohibits affirmative action policies (racial or gender set-asides, preferences or quotas) in public employment, contracting and education.

<sup>303</sup> 78 F 3d 932 (5<sup>th</sup> Circuit, 1996).

student body in university admissions, as it was not considered to be a ‘compelling state interest’.<sup>304</sup>

The United Nations Committee on the Elimination of Racial Discrimination remains ‘deeply concerned’ with these latest developments and has urged the United States to intensify their efforts in regards to the implementation of affirmative action.<sup>305</sup>

Moreover, the United States belongs to a ‘small group of countries that have not yet ratified *CEDAW*, including Iran and Sudan’.<sup>306</sup> Some commentators suggest that the reason the United States has not ratified the Treaty is its refusal to submit itself to international scrutiny regarding the rights of women, for example, equal pay in employment, abortion rights, and the legalisation of same-sex marriage and prostitution.<sup>307</sup> The United States’ obligation to implement affirmative action under *CERD* is investigated in this chapter taking into account federal legislation and executive orders.

This chapter begins with an analysis of the Equal Protection Clause. It considers the original intent of its framers and the first legal attempts to legislate for preferential treatment for blacks in the Reconstruction Era in the *Freedmen’s Bureau Acts* and related measures.<sup>308</sup> The analysis demonstrates that the framers

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<sup>304</sup> *Hopwood v Texas*, 78 F 3d 932 (5<sup>th</sup> Circuit, 1996) was overruled by *Grutter v Bollinger*, 539 US 306 (2003), in which the Supreme Court acknowledged narrowly tailored affirmative action policies in university admissions to achieve a diverse student body if they served a compelling state interest. In addition to the application of affirmative action policies in higher education, Texas started to use a Ten Percent Plan, which ‘guarantees admission to any public university in Texas to Texas students ranked in the top tenth of their high school class’. Mexican American Legal Defence and Educational Fund (MALDEF) et al, ‘Blend It, Don’t End It: Affirmative Action and the Texas Ten Percent Plan after Grutter and Gratz’ (2005) 8 *Harvard Latino Law Review* 34.

<sup>305</sup> United Nations, *CERD*, Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination CERD/C/USA/CO/6* (8 May 2008) 4-5.

<sup>306</sup> Amnesty International, *A Fact Sheet on CEDAW: Treaty for the Rights of Women* (2012) 1. The United States has never ratified *CEDAW*, but signed it on 17 July 1980. See also Chapter 1 III and Chapter 2 III C of this thesis.

<sup>307</sup> Marjorie Cohn, ‘Resisting Equality: Why the US Refuses to Ratify the Women’s Convention’ (2004) 27 *Thomas Jefferson Law Review* 16, 25; Harold Hongju Koh, ‘Why America Should Ratify the Women’s Rights Treaty (*CEDAW*)’ (2002) 34 *Case Western Reserve Journal of International Law* 272-3.

<sup>308</sup> The first legal attempt of preferential treatment for blacks started with the issuance of the *Freedmen’s Bureau Act of 1866* on 3 March 1866 (also including white war refugees in order to reduce the impression that blacks were treated preferably by the law), which established a federal Freedmen’s Bureau providing special support for blacks regarding ‘civil, political and social rights’, for example, in labour. The Freedmen’s Bureau lasted only a few years and was



of the Equal Protection Clause were responsible for several social equality measures during the Reconstruction Era, including the application of goals and limitations non equality measures. The implementation of the proactive equality measures shows that the Equal Protection Clause allows for the pursuit of substantive equality, and not merely for formal equality.

The social equality programs of the framers of the Equal Protection Clause are a model for today's affirmative action policies in the US. The most significant laws that constitute today's affirmative action in relation to employment are *Title VII of the Civil Rights Act of 1964*, *Executive Orders 10925 and 11246*, and the *Equal Employment Opportunity Act of 1972* (amending *Title VII of the Civil Rights Act of 1964*). The principles of disparate treatment and disparate impact, both based on *Title VII*, and used to set limits to affirmative action by the Supreme Court, are analysed against the background of the most recent Supreme Court case dealing with these principles in regards to affirmative action, *Ricci v DeStefano*.<sup>309</sup> This analysis shows that the tests used to limit affirmative action by the Supreme Court so far, the Strong Basis Test and Strict Scrutiny Test, lack clarity. The analysis also shows that specific affirmative action legislation and policies like *Executive Order 10925*, *Executive Order 11246* and the *Equal Employment Opportunity Act of 1972*, use vague language and undefined limits in the affirmative action measures they incorporate.

Finally, the chapter investigates the implementation of affirmative action through government agencies. This investigation considers the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Whilst the EEOC administers the voluntary application of affirmative action based on *Title VII of the Civil Rights Act of 1964*, which is regulated by Title 29 of the *Code of Federal Regulations*, the OFCCP enforces *Executive Order 11246* in regards to the implementation of affirmative action through federal contractors and subcontractors, which is regulated by Title 41 of the *Code of Federal Regulations*. The investigation of these regulations shows that much clearer long-term and interim goals have been

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abolished in 1972. Chad Alan Goldberg, *Citizens and Paupers: relief, rights, and race, from the Freedmen's Bureau to Workforce* (University of Chicago Press, 2007) 31, 36, 56.

<sup>309</sup> 129 S.Ct. 2658 (2009).

used to provide appropriate guidance for employers in applying these policies. In addition, the regulations recognise the temporary nature of affirmative action, but do not include a precise end point for the use of affirmative action.

## II. AMBIGUOUS CONSTITUTIONAL APPROACH

Unlike Canada and Australia, the United States takes an ambiguous approach towards affirmative action in its *Constitution*. Even though the term ‘affirmative action’ originates from the United States,<sup>310</sup> the US *Constitution* does not mention any allowances for affirmative action in contrast to the *Canadian Constitution*.<sup>311</sup> The extent to which affirmative action is constitutionally permissible has been determined through the interpretation of the concept of ‘equality’ in the Equal Protection Clause.

The American *Declaration of Independence of 1776* states proudly that it is a ‘self-evident truth, that all men are created equal’,<sup>312</sup> but the actual commitment

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<sup>310</sup> John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (University of Chicago Press, 1996) 6. The term ‘affirmative action’ was firstly used in the *National Labour Relations Act of 1935*, requiring employers who had discriminated ‘against union members or union organizers ... to place those victims where they would have been without the discrimination’ by taking affirmative action. During the Civil Rights Movement, the term was used again in *Executive Order 10925* of President John F Kennedy, and was also repeated in *Executive Order 11246* of President Lyndon B Johnson: at 7. These two Executive Orders are analysed in a later section of this chapter.

<sup>311</sup> *Canadian Charter of Rights and Freedoms*, s 15(2), which is investigated further in Chapter 5.

<sup>312</sup> *Declaration of Independence of 1776*; This historical document by Thomas Jefferson, which was adopted by Congress on 4 July 1776, declared the independence of the 13 colonies of British North America from Great Britain. The second sentence of the *Declaration* has become the most cited one, stating that ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness’. The *Declaration* itself does possess ‘an aura of sanctity’ in the United States. David Armitage, ‘The *Declaration of Independence* and International Law’ (2002) 59 (1) *William and Mary Quarterly* 40; Even though, the *Declaration of Independence* is of great legal significance in American history, it was not included in the *Constitution*. The *Declaration* can be seen as a ‘liberal document’, whilst the *Constitution* can be regarded as ‘democratic document’. ‘The *Declaration* addresses the question of ends; the *Constitution* addresses the question of means ... Thus, with respect to the question of judicial review in particular and the role of courts in general, the implications of the *Declaration*’s constitutional relevance are unclear’. Dan Himmelfarb, ‘The Constitutional Relevance of the Second Sentence of the Declaration of Independence’ (1990) 100 (1) *Yale Law Journal* 174-5, 186-7; Therefore, the *Declaration* is cited by the Supreme Court of the United States only on rare occasions regarding constitutional interpretations. It’s ‘most infamous decision’ in *Dred Scott v Sandford*, 60 US 393, 408-12 (1857) ruled that even though the *Declaration of Independence* states that all

of the *United States Constitution* to equality is rather abstract.<sup>313</sup> A first glimpse of the right to equality or the right to equal opportunity (without explicitly mentioning equality) can be found in the Preamble of the *Constitution*, which refers to the promotion of the general welfare of the people.<sup>314</sup> This statement can be interpreted as naturally implying the idea of equality amongst citizens by applying welfare ‘generally’ (or equally) to everyone.<sup>315</sup> However, the most important references to equality can be found in the amendments to the *Constitution*. The adoption of the 13<sup>th</sup> Amendment of the *Constitution* abolished slavery in 1865,<sup>316</sup> and the following 14<sup>th</sup> Amendment adopted in 1866,<sup>317</sup> contains the so called ‘Equal Protection Clause’ in section 1, that firstly uses the term ‘equality’ in the statement that that ‘No State shall ... deny to any person within its jurisdiction the equal protection of the laws’.<sup>318</sup> The rather abstract term ‘equal protection’ left much room for interpretation, and hence, could not resolve the question what the term ‘equality’ in general, and especially ‘racial equality’, meant.<sup>319</sup>

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men are created equal, African-Americans were perceived as an exception to this rule. Robert J Reinstein, ‘Completing the *Constitution*: the Declaration of Independence, Bill of Rights and Fourteenth Amendment’ (1993) 66 (2) *Temple Law Review* 362; The ‘Negro Race’ was not regarded as citizens ‘[w]ithin the Constitution of the United States, and, consequently, were not entitled to sue in its courts’ *Dred Scott v Sandford*, 60 US 393, 406 (1857).

<sup>313</sup> Charles Fried, *Saying What the Law is: the Constitution in the Supreme Court* (Harvard University Press, 2005) 207.

<sup>314</sup> *United States Constitution* Preamble.

<sup>315</sup> Other articles of the *Constitution* that could be seen as supporting equality amongst citizens are article I (9), which states that ‘[n]o title of nobility shall be granted by the United States’, and article IV (2), which entitles citizens of each State ‘to all Privileges and Immunities of Citizens in the several States’. *United States Constitution* art I § 9, art IV § 2.

<sup>316</sup> In addition to the 13<sup>th</sup> and 14<sup>th</sup> amendments of the *Constitution*, amendment XV, which was ratified on 3 February 1870, guaranteed voting rights regardless of ‘race, colour, or previous condition of servitude’. *United States Constitution* amend XV § 1.

<sup>317</sup> Generally, the fundamental rights of citizens are outlined in the so called *Bill of Rights*, which is formed by the first ten amendments of the *Constitution* and was ratified in 1791. All further amendments were added after the Civil War. Ronald Dworkin, *Freedom’s Law: the Moral Reading of the American Constitution* (Oxford University Press, 1996) 7.

<sup>318</sup> *United States Constitution* amend XIV § 1.

<sup>319</sup> Mark V Tushnet, ‘The Politics of Equality in Constitutional Law: the Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston’ (1987) 74 (3) *The Journal of American History* 885. ‘[T]he Reconstruction era debates are inconclusive on the question of what sort of racial equality the 14<sup>th</sup> Amendment embodied. The lawmakers who discussed equality during Reconstruction accepted midcentury conceptions that distinguished equality with respect to civil rights, to social rights, and to political rights. Controversy existed over the grounds for distinguishing each category from the others, and over the relationship among the categories. Those controversies contributed to the instability of political coalitions supporting equality’: at 885-6.

Even today, the meaning of the Equal Protection Clause is not finally resolved. Its interpretation depends on whether it aims at formal or substantive equality, of which the latter could be regarded as the original intent of its framers.<sup>320</sup> The original intent of the framers can be identified by investigating their approach towards the so called *Freedmen's Bureau Act of 1866*.<sup>321</sup> This Act is known as the first temporary race-conscious federal program in American history.<sup>322</sup>

### **A. *Freedmen's Bureau Act of 1866***

In 1865, the first *Freedmen's Bureau Act of 1865* established the 'Bureau for the Relief of Freedmen and Refugees', also known as the Freedmen's Bureau, to support freedmen (freed former slaves) and refugees (white persons) 'during the present war of rebellion, and for one year thereafter'.<sup>323</sup> The situation of the freedmen, who had to survive as free persons in society for the first time, without having any financial means or any educational background, was particularly destitute. Therefore, the amended second *Freedmen's Bureau Act of 1866*<sup>324</sup> focused on educational support for freedmen by limiting educational measures<sup>325</sup>

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<sup>320</sup> See also Paul Finkelman, 'John Bingham and the Background to the Fourteenth Amendment' (2003) 36 *Akron Law Review* 691-2; Robin West, 'The Missing Jurisprudence of the Legislated Constitution' in Jack M Balkin and Reva B Siegel (eds), *The Constitution in 2020* (Oxford University Press, 2009). One interpretation is that 'equal protection' means '[n]ot a broad guarantee of protection (equal or otherwise) against various unstated evils or harms but rather, a guarantee of protection against pernicious laws and lawmakers that irrationally discriminate against some groups of citizens': at 80.

<sup>321</sup> *Freedmen's Bureau Act of 1866*, 14 Stat 173, 176 (1866), which was enacted on 16 July 1866; See also Carl E Brody, 'A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court' (1996) 29 *Akron Law Review* 296.

<sup>322</sup> Eric Schnapper, 'Affirmative Action and the Legislative History of the Fourteenth Amendment' (1985) 71 (5) *Virginia Law Review* 784.

<sup>323</sup> *Freedmen's Bureau Act of 1865*, ch90, 13 Stat 507 (1865); The supporting measures included 'the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen ... under such rules and regulations as may be prescribed by the head of the bureau and approved by the President'. US Congressional Documents and Debates, 1774-1875, 38<sup>th</sup> Congress, 2<sup>nd</sup> session, ch90, §§ 1, 2, 4.

<sup>324</sup> The *Freedmen's Bureau Act of 1866*, which was passed into law on 16 July 1866, was enacted after 2 presidential vetoes, and numerous modifications due to heated debate in Congress about whether or not preferential treatment for blacks could be legally accepted. These debates resemble later debates in Congress about affirmative action policies today. See also Barry Sullivan, 'Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981' (1989) 98(3) *Yale Law Journal* 550.

<sup>325</sup> 'The best known black institutions of higher learning were formed during this period. Atlanta University, Fisk University, Howard University, Morehouse College, etc, developed from crude beginnings in such out of the way places as abandoned freight cars'. Prince E Wilson, 'Discrimination Against Blacks in Education: An Historical Perspective' in William T Blackstone and Robert D Heslep (eds) *Social Justice & Preferential Treatment – Women and Racial Minorities in Education and Business* (University of Georgia Press, 1977) 168.

almost exclusively to them.<sup>326</sup> Furthermore, the Act's application was extended for two more years,<sup>327</sup> followed by another extension for another year in June 1868.<sup>328</sup> The extensions were directly linked to the continued need of its beneficiaries. In January 1869, the functions of the Freedmen's Bureau were reduced to educational support of mainly blacks, and the collection and payments of money to black servicemen, like the armed forces and sailors, to ensure they were paid properly in comparison to their white counterparts.<sup>329</sup> In 1870, the Freedmen's Bureau ceased its existence due to funding problems.<sup>330</sup>

The *Freedmen's Bureau Acts* were clearly intended to serve the purpose of support for mainly freedmen, under the conditions that this help would only be provided temporarily until it was not necessary anymore.<sup>331</sup> However, educational support was meant to continue even after the abolition of the federal Freedmen's Bureau in the States themselves, which were supposed to establish 'suitable provisions for the education of the children of freedmen'.<sup>332</sup> Furthermore, the same 39<sup>th</sup> Congress that was responsible for the *Freedmen's Bureau Acts* enacted other preferential treatment legislation for blacks.<sup>333</sup> Among other things, these Acts distributed financial assistance to 'destitute coloured

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<sup>326</sup> *Freedmen's Bureau Act of 1866*, ch200, §§ 12-3, 14 Stat 173, 176, (1866); There had been much controversy in Congress about whether or not whites should be included into the supportive measures of the Freedmen's Bureau and to what extent this should happen. Schnapper, above n 322, 776; see also John M Bickers, 'The Power to do What Manifestly Must be done: Congress, the Freedmen's Bureau, and Constitutional Imagination' (2006) 12 *Roger Williams University Law Review* 81-120.

<sup>327</sup> *Freedmen's Bureau Act of 1866*, Act of July 16, 1866, ch200, §1, 14 Stat 173 (1866) which states that 'the act to establish a bureau for the relief of freedmen and refugees, approved March third, eighteen hundred and sixty-five, shall continue in force for the term of two years from and after the passage of this act'.

<sup>328</sup> Act of July 6, 1868, ch135, § 1, 15 Stat 83 (1868).

<sup>329</sup> Act of July 25, 1868, ch245, §2, 15 Stat 193 (1868).

<sup>330</sup> Schnapper, above n 322, 783.

<sup>331</sup> Act of July 6, 1868, ch135, § 2, 15 Stat 83 (1868).

<sup>332</sup> *Ibid.*

<sup>333</sup> See also Chad Alan Goldberg, *Citizens and Paupers: relief, rights, and race, from the Freedmen's Bureau to Workforce* (University of Chicago Press, 2007) 31, 36, 56; Jed Rubenfeld, 'Affirmative Action' (1997) 107 (2) *Yale Law Journal* 430-1. '[M]ost lawyers and judges are unaware that Congress in the 1860s repeatedly enacted statutes allocating special benefits to blacks on the basis of race (and I am not referring to the well-known Freedmen's Bureau Acts)': at 427. The author continues stating that the Freedmen's Bureau Acts directed '[b]enefits to blacks but used classifications that were formally race-neutral': at 431.

women and children’,<sup>334</sup> and set aside land for the particular use of ‘schools for coloured children’.<sup>335</sup>

Overall, the intentions of the framers of the Fourteenth Amendment of the *Constitution* can be interpreted as supportive of race-conscious temporary affirmative action policies, because the same framers (39<sup>th</sup> Congress) also adopted the *Freedmen’s Bureau Act of 1866*, which were ‘fully aware of the racial limitations in the Freedmen’s Bureau programs’.<sup>336</sup> Hence, the 39<sup>th</sup> Congress enacted the Fourteenth Amendment in order to ‘[v]alidate race-conscious policies of the *Civil Rights Act of 1866* and the *Freedmen’s Bureau Act of 1866*’.<sup>337</sup> As a result, the Supreme Court has held that affirmative action policies of today are within the spirit of the framers of the Fourteenth Amendment, and are constitutional.

The way the framers enacted the first race-conscious programs for African-Americans is an example for today’s affirmative action policies. The core components of the *Freedmen’s Bureau Acts* included a focus on achieving better job opportunities for African-Americans, and an aim to provide better educational opportunities for African-Americans. Importantly, the Acts used temporary measures to achieve their goals.<sup>338</sup>

The acceptance of the framers of the Fourteenth Amendment of race-conscious programs indicates that the term ‘equal protection of the laws’ of the Equal Protection Clause provides for substantive equality with a focus on equal

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<sup>334</sup> Act of July 28, 1866, ch296, 14 Stat 310, 317 (1866); This Act makes appropriations ‘[f]or sundry Civil Expenses of the Government for the Year ending June 30, 1867, and for other purposes’; The Act focuses also particularly on financial support for coloured women and children stating that: ‘[F]or the ‘National association for the relief of destitute coloured women and children’: at 317.

<sup>335</sup> Act of July 28, 1866, ch308, 14 Stat 343 (1866).

<sup>336</sup> Schnapper, above n 322, 785; ‘[C]ongressman Bingham, the author of the fourteenth amendment, saw no objection to the general racial limitation in the *Freedmen’s Bureau Act*’: at 777.

<sup>337</sup> Carl E Brody, ‘A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court’ (1996) 29 *Akron Law Review* 296; ‘[A]mending the *Constitution* [by adding the Fourteenth Amendment] became necessary because of President Johnson’s decision to veto the original versions of the 1866 *Freedmen’s Bureau Act* and the *Civil Rights Act of 1866*. In both cases, the President made classic conservative arguments. Johnson claimed that providing special provisions to former slaves while not providing the same provisions for unfortunate whites was unfair’: at 296.

<sup>338</sup> Act of July 25, 1868, ch245, §2, 15 Stat 193 (1868); See also John M Bickers, ‘The Power to do What Manifestly Must be done: Congress, the Freedmen’s Bureau, and Constitutional Imagination’ (2006) 12 *Roger Williams University Law Review* 81-120.

outcomes.<sup>339</sup> This interpretation of the intent of the framers of the Fourteenth Amendment of the *Constitution* is not unanimously accepted.<sup>340</sup> The resolution of the debate about the interpretation of the Equal Protection Clause is crucial for the legitimacy of affirmative action policies. If the Equal Protection Clause of the Fourteenth Amendment is based on substantive equality, affirmative action policies may be required by it, but if it refers only to formal equality, these policies would violate the *Constitution*. It is this dilemma that gives the *Constitution of the United States* an ambiguous approach towards affirmative action policies. The Supreme Court of the United States has adopted a number of approaches to interpreting the Equal Protection Clause in regards to racial qualifications, and has used these approaches to set limits to affirmative action policies.

### **B. *The Strict Scrutiny Test of the Supreme Court***

The Supreme Court of the United States has applied the so-called ‘Strict Scrutiny Test’,<sup>341</sup> to determine the constitutional validity of ‘government measures

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<sup>339</sup> See generally Maureen B Cavanaugh, ‘Towards a New Equal Protection: Two Kinds of Equality’ (1994) 12 *Law and Inequality: A Journal of Theory & Practice* 381-428. The author agrees to the idea of substantive equality in the Equal Protection Clause stating that ‘Recognition of the two types of equality is essential for an understanding and implementation of the substantive basis of the Equal Protection Clause’: at 384-5, 426; Cedric Merlin Powell, ‘Hopwood: Bakke II and Skeptical Scrutiny’ (1999) 9 *Seton Hall Constitutional Law Journal* 811-933; Tanya M Washington, ‘All Things Being Equal: The Promise of Affirmative Efforts to Eradicate Colour-Coded Inequality in the United States and Brazil’ (2009) 21 (3) *National Black Law Journal* 1-49.

<sup>340</sup> See generally Gary Goodpaster, ‘Equality and Free Speech: the Case against Substantive Equality’ (1997) 82 *Iowa Law Review* 649-666. The author argues against substantive equality of the Equal Protection Clause stressing that ‘[t]he Equal Protection Clause compromises a territory, large and yet not completely explored, expansive enough to admit competing equalities as residents. Substantive equality theorists, however, demand one version of equality ... not considering the cost of the state forces needed to equalize or level’: at 686; Melissa L Saunders, ‘Equal Protection, Class Legislation, and Colour-Blindness’ (1997) 96 *Michigan Law Review* 272-5. ‘[F]or all its moral attractiveness ... the notion that the Equal Protection Clause gives every person a substantive right not to be dealt with by the state on the basis of race remains flatly inconsistent with the original understanding’: at 326; Timothy Zick, ‘Angry White Males: the Equal Protection Clause and “Classes of One”’ (2000) 89 *Kentucky Law Journal* 92-3; Christopher R Green, ‘The Original Sense of the (Equal) Protection Clause: Pre-Enactment History’ (2008) 19 *George Mason University Civil Rights Law Journal* 47-75.

<sup>341</sup> Kenneth L Karst and Harold W Horowitz, ‘Affirmative Action and Equal Protection’ (1974) 60 (6) *Virginia Law Review* 963; Richard H Fallon, ‘Strict Judicial Scrutiny’ (2007) 54 *UCLA Law Review* 1267-73. The term of ‘strict scrutiny’ was first used by the Supreme Court in *Skinner v Oklahoma*, 316 US 535, 536 (1942), but remained largely undefined (the case involved the sterilization of three-time felons, and the Court stated that strict scrutiny must be applied if the State makes classifications for sterilization). In 1969, the Strict Scrutiny Test was used in its contemporary application in *Shapiro v Thompson*, 394 US 618 (1969), stating that all

drawing distinctions' between people on the basis of race.<sup>342</sup> To satisfy the Strict Scrutiny Test, the Supreme Court has to be persuaded that the use of a suspect classification, like race, in a governmental measure is necessary to achieve a compelling governmental interest.<sup>343</sup> In other words, strict scrutiny implies that any affirmative action policies are regarded as unconstitutional '[u]nless they serve "a compelling governmental interest" and are "narrowly tailored" to serve that interest'.<sup>344</sup>

The term 'narrowly tailored' means that the Court has to ensure that a classification (or affirmative action policy) is explicitly designed to achieve its goal, and the term 'compelling governmental interest' means that the 'goal itself must be of the highest order'.<sup>345</sup> Put more simply, applying strict scrutiny means 'to look very hard at the justifications that the government has given for a program, rather than simply taking the government's word that the program is needed to achieve an extraordinarily important government interest'.<sup>346</sup> This procedure of strict scrutiny by the United States Supreme Court has led to successful challenges of many government affirmative action programs.<sup>347</sup> The use of the strict scrutiny test to invalidate affirmative action policies began to change in *Grutter v Bollinger*,<sup>348</sup> when the Supreme Court supported the University of Michigan Law School 'in determining which governmental uses of

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classifications regarding fundamental rights must be assessed with strict scrutiny. In *Kramer v Union Free School District No 15*, 395 US 621,627 (1969) strict scrutiny was again applied including the requirement of a compelling state interest: at 1283.

<sup>342</sup> Gerald L Neumann, 'Equal Protection, "General Equality" and Economic Discrimination from a US Perspective' (1999) 5 *Columbia Journal of European Law* 285.

<sup>343</sup> *Grutter v Bollinger* (2003) 539 US 306, 307.

<sup>344</sup> Victor J Zupa, 'The U.S. Supreme Court establishes a new Era of Affirmative Action for Federal Contracts' (1996) 43 *Federal Lawyer* 40.

<sup>345</sup> Daniel A Farber and Suzanna Sherry, *Judgment Calls: Principle and Politics in Constitutional Law* (Oxford University Press, 2009) 158.

<sup>346</sup> *Ibid* 161.

<sup>347</sup> Michelle Adams, 'From Brown to Grutter: Affirmative Action and Higher Education in the South – Searching for Strict Scrutiny in *Grutter v Bollinger*' (2004) 78 *Tulane Law Review* 1943. Cases in which affirmative action programs were terminated are *Regents of University of California v Bakke*, 438 US 265 (1978); *Wygant v Jackson Board of Education*, 476 US 267 (1986); *City of Richmond v J A Croson Co*, 488 US 469 (1989); and *Adarand Constructors Inc v Pena*, 515 US 200 (1995).

<sup>348</sup> 539 US 306, 330-2 (2003). '[T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races" ... The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity ... These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints': at 330.



race were particularly socially relevant' and therefore permissible as affirmative action policies.<sup>349</sup> The University of Michigan Law School's affirmative action program passed the Strict Scrutiny Test, because it only used race as an additional factor considering '[a]ll pertinent elements of diversity, it [the Law School] can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants'.<sup>350</sup>

Besides the Strict Scrutiny Test, the Supreme Court also applies the idea of a 'remedial purpose' of affirmative action policies to limit its application. If an affirmative action policy implemented to address a formerly identified discrimination, it is acknowledged as constitutional by the Court, because it serves to 'remedy past discrimination'.<sup>351</sup> In *City of Richmond v J A Croson*<sup>352</sup> the Supreme Court held that '[u]nless classifications based on race are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility'.<sup>353</sup> Even though, the Supreme Court allows the application of affirmative action policies in order to remedy past discrimination, this use of a 'remedial purpose' to limit affirmative action policies is not unanimously supported. Some commentators fear it will increase racial tensions.<sup>354</sup> In contrast to the application of affirmative action policies for remedying past discrimination, the use of affirmative action policies based on general societal discrimination is not acknowledged as constitutional by the Supreme Court.<sup>355</sup>

In 2003, the Supreme Court mentioned for the first time a concrete time limit for affirmative action policies in *Grutter v Bollinger*.<sup>356</sup> The policy in question was an admission policy in higher education. Justice O'Connor stated that the Court

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<sup>349</sup> Adams, above n 347, 1943.

<sup>350</sup> *Grutter* (2003) 539 US 306, 341, further stating that '[N]arrow tailoring ... requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit''.

<sup>351</sup> Mark D Plevin, 'The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to certain Politically Responsible Bodies' (1981) 67 *Virginia Law Review* 1235.

<sup>352</sup> 488 US 469 (1989).

<sup>353</sup> *City of Richmond v J A Croson*, 488 US 469, 493 (1989).

<sup>354</sup> Lisa E Chang, 'Remedial Purpose and Affirmative Action: False Limits and Real Harms' (1997) 16 *Yale Law and Policy Review* 107.

<sup>355</sup> *Regents of University of California v Bakke*, 438 US 265, 310 (1978).

<sup>356</sup> 539 US 306 (2003).

expects ‘that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today [the achievement of a diverse student body through affirmative action policies]’.<sup>357</sup> Even though the temporary nature of affirmative action had been mentioned in various court cases before,<sup>358</sup> the *Grutter v Bollinger* case presented the first concrete time limit. However, Justice O’Connor’s estimate of 25 years as a temporary limit for affirmative action policies was not made part of the court orders, and is not therefore legally binding. Furthermore, Justice O’Connor did not outline how it could be assessed whether or not the goals of affirmative action policies will be achieved by 2028, ‘thereby opening the door for future litigation’.<sup>359</sup>

Justice O’Connor’s prediction of 25 years as a time limit may put a ‘heavier burden of proof on those who defend the use of affirmative action’, in the event that these policies will still be necessary 25 years after the judgment.<sup>360</sup> Justice O’Connor was supported by Justice Ginsburg, who stated that affirmative action policies ‘must have a logical end point’.<sup>361</sup> However, Justice Ginsburg also outlined the estimated time limit of affirmative action policies as more symbolic than effective when she stated that ‘from today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward

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<sup>357</sup> Ibid 343, stating further that ‘[i]n summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body’.

<sup>358</sup> See also *United Steelworkers of America v Weber*, 443 US 193, 208 (1979) stating that ‘[T]he plan [affirmative action policy] is a temporary measure; it is not intended to maintain racial balance, but simply eliminate a manifest racial imbalance’; *City of Richmond* (1989) 488 US 469, 510 stating that race-conscious policies are ‘[a] temporary matter, a measure taken in the service of the goal of equality itself’; *Johnson v Transportation Agency, Santa Clara County, Cal.*, 480 US 616, 639-40 (1987) stating that ‘the Plan [affirmative action policy] contains no explicit end date, for the Agency’s flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary if the program sets aside positions according to specific numbers’; *Fullilove v Klutznick*, 448 US 448, 513 (1980) stating that ‘[A]s soon as the PWEA program concludes [Public Works Employment Act of 1977, which enforces a set-aside for minority businesses], this set-aside program ends. The temporary nature of this remedy [affirmative action policy] ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate’.

<sup>359</sup> Charles J Russo and Ralph D Mawdsley, ‘American update: the Supreme Court and affirmative action’ (2003) 15(4) *Education and the Law* 269.

<sup>360</sup> Ronald Dworkin, ‘The Court and the University’ (2003-2004) 72 *University of Cincinnati Law Review* 896; Christopher J. Schmidt, ‘Caught in a Paradox: Problems with Grutter’s Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years’ (2004) 24 *Northern Illinois University Law Review* 753,783.

<sup>361</sup> *Grutter v Bollinger*, 539 US 306, 344 (2003).

non-discrimination and genuinely equal opportunity will make it safe to sunset affirmative action'.<sup>362</sup>

Overall, the estimated time limit for affirmative action by Justice O'Connor was not welcomed by all justices of the Court. In addition, some of the justices were divided about the constitutionality of affirmative action. Justice Thomas not only claimed that the use of affirmative action in higher education was unconstitutional, but also rejected Justice O'Connor's estimated time limit.<sup>363</sup> Justice Thomas stated that 'while I agree that in 25 years the practices of the Law School will be illegal, they are ... illegal now.'<sup>364</sup> He continued that 'the majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe.'<sup>365</sup> Justice Thomas was joined by Justice Kennedy who agreed that 'it is difficult to assess that the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now'.<sup>366</sup> Justice Rehnquist also rejected the idea of a time limit stating that 'these discussions of a time limit are the vaguest of assurances'.<sup>367</sup>

*Grutter v Bollinger* clearly illustrates that the Justices of the Supreme Court were highly divided not only over the constitutionality of affirmative action policies, but also over the desirability and possibility of setting concrete time limits for these policies in higher education. Nevertheless, it is also clear that the Supreme Court recognises the temporary nature of affirmative action policies. This has also been recognised in previous cases. For example, in *Johnson v Transportation Agency*,<sup>368</sup> it was stated that affirmative action policies are 'intended to attain a balanced workforce, not to maintain one',<sup>369</sup> and in *Fullilove v Klutznick*,<sup>370</sup> where Justice Powell stated that the 'temporary nature of this

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<sup>362</sup> Ibid 346.

<sup>363</sup> Ibid 374-75.

<sup>364</sup> Ibid 375.

<sup>365</sup> Ibid 375-6.

<sup>366</sup> Ibid 394.

<sup>367</sup> Ibid 386-7.

<sup>368</sup> 480 US 616 (1987).

<sup>369</sup> Ibid 639.

<sup>370</sup> *Fullilove v Klutznick*, 448 US 448 (1980).

remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate'.<sup>371</sup>

The case *Grutter v Bollinger*<sup>372</sup> is important both for its discussion of temporal limits for affirmative action policies, and also for its deviation from a liberal interpretation of a colour-blind *Constitution*.<sup>373</sup> The Court's view on affirmative action policies has always been influenced by liberal democratic theory,<sup>374</sup> which has played a crucial role in the history of the United States.<sup>375</sup>

As discussed in Chapter 3, liberal democratic theory emphasises individualism and formal equality.<sup>376</sup> This liberal influence makes it difficult for the Court to support affirmative action, and leads to its restrictive handling of these policies. The Supreme Court's refusal to review the decision of the Ninth Circuit Court of Appeal to uphold California Proposition 209<sup>377</sup> was seen by parts of the liberal media 'as evidence of the Court's willingness "to drive a stake through the heart of affirmative action"'.<sup>378</sup> Despite this liberal perception of the Supreme Court's intentions regarding affirmative action policies, the Court has upheld these

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<sup>371</sup> Ibid 513.

<sup>372</sup> 539 US 306 (2003). Affirmative action in education is currently under review by the United States Supreme Court in the case *Fisher v University of Texas at Austin*, 132 S.Ct. 1536 (Memphis) US. Fisher claims that race should not be taken into account regarding university admissions any longer (even if it complies with the requirements of *Grutter*), because a sufficient number of non-White students is already eligible for university admissions to guarantee diversity in the University of Texas without the need of a program that takes race into account as one of many factors. *Fisher* reveals the difficulties of applying affirmative action programmes in education: if a university uses numerical goals and quotas in race-based admissions it would violate *Grutter*, but if it uses race in admissions only very modestly, it can be assumed that its effects are minimal and therefore the factor race in admissions might be not necessary any longer at all. Tomiko Brown-Nagin, 'The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change' (2012) 65 *Vanderbilt Law Review En Banc* 122.

<sup>373</sup> Guy-Uriel E Charles, 'From Brown to Grutter: Affirmative Action and Higher Education in the South – Affirmative Action and Colour-Blindness from the Original Position' (2004) 78 *Tulane Law Review* 2009.

<sup>374</sup> Liberal democratic theory generally favours a colour-blind interpretation of the *US Constitution*, which has been supported by many Supreme Court justices in regards to affirmative action policies over time. For example, in *Plessy v Ferguson*, 163 US 537 (1896) Justice Harlan stated that '[o]ur constitution is colour-blind, and neither knows nor tolerates classes amongst citizens. In respect of civil rights, all citizens are equal before the law': at 559; in *Grutter* (2003) 539 US 306, Justice Thomas stated that '[t]he *Constitution* abhors classifications based on race, not only because those classifications can harm favoured races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all': at 353.

<sup>375</sup> Charles, above n 373, 2011.

<sup>376</sup> See Chapter 3 for a more detailed definition for liberalism.

<sup>377</sup> See above Introduction.

<sup>378</sup> John Cocchi Day, 'Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace' (2001) 89 *California Law Review* 73-4.

affirmative action policies on occasions. However, the rulings of the Supreme Court in regards to affirmative action have not always been clear when setting limitations to these policies. In order to better understand the Supreme Court's attitude to affirmative action and the setting of goal-oriented and temporal limits to affirmative action policies, the cases of *Johnson v Transportation Agency*<sup>379</sup> and *Adarand Constructors, Inc. v Peña*<sup>380</sup> are assessed in more detail below.

### ***C. Supreme Court Cases and Limits for Affirmative Action***

#### ***1. Johnson v Transportation Agency***<sup>381</sup>

Johnson was a male employee of a Transportation Agency. Johnson claimed that he missed out on a promotion because a female employee was unfairly chosen over him. Johnson filed suit on grounds of sex discrimination under *Title VII of the Civil Rights Act of 1964* against the company. The decision to promote a woman over Johnson was the result of an affirmative action plan, that involved short-range goals for women and minorities, which were 'annually adjusted to serve as the most realistic guide for actual employment decisions'.<sup>382</sup> Even though this plan did not involve numerical goals, it 'authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented' in employment decisions.<sup>383</sup>

In order to decide about the validity of this affirmative action plan, the Court referred to *Weber*,<sup>384</sup> a case in which an affirmative action policy was deemed as valid if it was 'designed to eliminate ... work force imbalances in traditionally segregated job categories'.<sup>385</sup> This requirement was regarded as fulfilled in

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<sup>379</sup> 480 US 616 (1987).

<sup>380</sup> 515 US 200 (1995).

<sup>381</sup> 480 US 616 (1987).

<sup>382</sup> *Johnson v Transportation Agency*, 480 US 616, 622 (1987).

<sup>383</sup> *Ibid.*

<sup>384</sup> *United Steelworkers of America v Weber*, 443 US 193 (1979).

<sup>385</sup> *Johnson* (1987) 480 US 616, 637.

*Johnson*, because ‘given the obvious imbalance in the Skilled Craft category, and given the Agency’s commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of the female employee in its decision.’<sup>386</sup> In accordance to *Weber*,<sup>387</sup> another requirement had to be fulfilled to validate the Agency’s affirmative action plan, which included the requirement not to ‘unnecessarily trammel the rights of male employees or creat[e] an absolute bar to their advancement’.<sup>388</sup> Even though, *Johnson* did not receive the promotion, he stayed employed at the Transportation Agency with ‘the same salary and with the same seniority, and remained eligible for other promotions’.<sup>389</sup>

The affirmative action plan of the Transportation Agency included a permanent part, which was described as ‘the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis’, that was perceived as ‘divorced ... from specific numbers and percentages’.<sup>390</sup> To avoid opposition to its affirmative action plan, the Transportation Agency ‘anticipated only gradual increases in the representation of minorities and women’.<sup>391</sup> Hence, the plan did not contain an ‘explicit end date, for the Agency’s flexible case-by-case approach was not expected to yield success in a brief period of time’.<sup>392</sup> The Court addressed this lack of a temporal limit, stating that an ‘express assurance that a program is only temporary may [only] be necessary if the program actually sets aside positions according to specific numbers’.<sup>393</sup>

The fact that these numerical goals were missing in the affirmative action plan, and the Transportation Agency only undertook a ‘moderate, gradual approach to eliminating the imbalance in its workforce ... as well as the Agency’s express commitment to [only] “attain” a balanced workforce’, led to the Court accepting the plan. The Court accepted the lack of a temporary limit in the Agency’s plan, because the Agency did not intend to use it to maintain a balanced workforce over time:

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<sup>386</sup> *Ibid.*

<sup>387</sup> *United Steelworkers of America* (1979) 443 US 193.

<sup>388</sup> *Johnson* (1987) 480 US 616, 637-8.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid* 639.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid* 639-40.

The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. As both, the Plan's language and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.<sup>394</sup>

Even though the Supreme Court has set out limits for affirmative action plans regarding statistical imbalances within workforces, it has not outlined when an imbalance is statistically significant.<sup>395</sup>

## 2. *Adarand Constructors, Inc v Pena*<sup>396</sup>

Despite submitting the lowest bid in regards to a federal highway construction contract, Adarand Constructors was not awarded a government contract because a governmental affirmative action program favoured members of disadvantaged business enterprises. Adarand filed suit on grounds of discrimination under the equal protection component of the Fifth's Amendment Due Process Clause. The Court of Appeals affirmed the federal affirmative action program, applying intermediate strict scrutiny, but the Supreme Court overturned this decision on the ground that the reviewing court should have used strict scrutiny test to assess the validity of the affirmative action program.<sup>397</sup> *Adarand Constructors, Inc. v Pena* demonstrates the struggle of the Supreme Court to agree on a methodology to validate and set limits for federal affirmative action policies.

The opinion of the Court in *Adarand* included that 'all racial classifications, imposed by whatever federal, state, or local government actor, must be analysed by a reviewing court under strict scrutiny'.<sup>398</sup> This decision was based on the findings in *Richmond v J.A. Croson Co.*,<sup>399</sup> in which it was established 'that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments'.<sup>400</sup> The case law represented in *Croson* established three

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<sup>394</sup> Ibid 641.

<sup>395</sup> Ibid 652.

<sup>396</sup> *Adarand Constructors, Inc v Pena*, 515 US 200 (1995).

<sup>397</sup> *Adarand Constructors, Inc v Skinner*, 790 F Supp 240 (Colorado 1992).

<sup>398</sup> Ibid 201.

<sup>399</sup> 488 US 469 (1989).

<sup>400</sup> *Adarand* (1995) 515 US 200, 201.

general propositions with respect to governmental racial qualifications'.<sup>401</sup> *Wygant v Jackson Board of Education* established the principle of 'scepticism': that '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination'.<sup>402</sup> *Buckley v Valeo* established the principles of 'consistency' and 'congruence'. The principle of consistency required that '[t]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification' and the principle of congruence maintained that '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment'.<sup>403</sup> When these principles were applied in *Adarand*, the Court held that strict scrutiny had to be used for persons who were subjected to unequal treatment of 'any governmental actor subject to the *Constitution*'.<sup>404</sup>

The decision to use strict scrutiny in *Adarand* was not regarded as appropriate by all judges of the Court.<sup>405</sup> Justice Stevens rejected the Court's determination to use legal tests consistently to determining the validity of affirmative action measures regardless of the factual circumstances. He stated that:

[A]s the law currently stands, the Court will apply 'intermediate scrutiny' to cases of invidious gender discrimination and 'strict scrutiny' to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about 'consistency' will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans – even though, the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves ... When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.<sup>406</sup>

Furthermore, Justice Stevens disagreed with the Court's concept of congruence, which did not acknowledge the 'significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a

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<sup>401</sup> Ibid.

<sup>402</sup> 476 US 267 (1986).

<sup>403</sup> 424 US 1, 93 (1976).

<sup>404</sup> *Adarand* (1995) 515 US 200, 201.

<sup>405</sup> Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined; Justice Souter filed a dissenting opinion, in which Justice Ginsburg and Justice Breyer joined; and Justice Ginsburg filed a dissenting opinion, in which Justice Breyer joined. *Adarand* (1995) 515 US 200, 203.

<sup>406</sup> Ibid 247.



decision by a State or a municipality'.<sup>407</sup> Even though these essential 'practical and legal differences between federal and state or local decision-makers' had been acknowledged on several occasions by the Court, Justice Stevens claims that '[i]ronically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue' avoiding any explanation for such a 'sudden and enormous departure from the reasoning in past cases'.<sup>408</sup> This difference, which is ignored by the *Adarand* Court, includes 'Congress institutional competence and constitutional authority to overcome historic racial subjugation and the States lesser power to do so'.<sup>409</sup>

Justices Souter and Ginsburg joined Justice Stevens in dissent. Justice Ginsburg stressed the common understandings of the Court besides the disagreements in *Adarand*, by acknowledging the United States' history of racial segregation and discrimination, and the need for remedial programs to further the end of discrimination by stating that 'Congress surely can conclude that a carefully designed affirmative action program may help to realise, finally, "the equal protection of the laws" the Fourteenth Amendment has promised since 1868'.<sup>410</sup> Furthermore, Justice Ginsburg stated that '[w]hile I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions'.<sup>411</sup>

Justice Ginsburg's view of the adaptation of the Supreme Court regarding changing conditions in order to judge affirmative action policies appropriately within their changing contexts over time seems to be a fair conclusion. Unfortunately, nothing is said about the determining factors, the methodology for such a perpetual adaptation. Overall, the Court in *Adarand* struggled with the setting of limits in its strict scrutiny test and undermined its own precedents in the process of doing so. This struggle of the Supreme Court could be partly based on the liberal values of freedom and equality, which are essential within

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<sup>407</sup> Ibid 249.

<sup>408</sup> Ibid 252-3.

<sup>409</sup> Ibid 253.

<sup>410</sup> Ibid 274.

<sup>411</sup> Ibid 276.

the American society, but constitute a permanent challenge for the implementation of affirmative action policies by limiting the legal frameworks that are necessary for its application.

#### **D. Conclusion**

Overall, section II of this thesis demonstrated that the United States follows an ambiguous constitutional approach towards affirmative action. The *United States Constitution* does not mention affirmative action, and it is a matter of interpretation of the phrase ‘equal protection of the laws’, of the Equal Protection Clause of the Fourteenth Amendment, whether or not these policies are legal or prohibited by the *Constitution*. Furthermore, it was shown that the first race-conscious affirmative action policies in American history (during the Reconstruction Era), created by the framers of the Equal Protection Clause, had limitations in application and time. Hence, those first affirmative action policies were intentionally designed to be goal-oriented and have temporal limits, because these elements were regarded as crucial and defining for these measures by their enacting Congress. Therefore, originally, limitations were regarded as vital elements of affirmative action.

It has also been illustrated that it is a matter of interpretation whether or not the Supreme Court of the United States holds these policies permissible, applying the limitations of the Strict Scrutiny Test or the requirement of a ‘remedial purpose’ to these policies. The Supreme Court’s struggle to set limitations for affirmative action can be partly based on the dominating liberal ideas of freedom and equality, which also includes the change of the comprehension of the concept of ‘equality’ over time from its early beginnings in *Plessy v Ferguson*,<sup>412</sup> with its ‘separate but equal’ doctrine, to *Brown v Board of Education*,<sup>413</sup> which

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<sup>412</sup> *Plessy v Ferguson*, 163 US 537 (1896), Plessy, challenged a Louisiana statute, which ‘[e]nacted that all railway companies carrying passengers, shall provide equal, but separate, accommodations for the white or coloured races, by providing two or more passenger coaches for each train, or by dividing passenger coaches, and prohibiting persons from occupying seats in any coaches other than the ones assigned to them on account of the race to which they belong’: at 540. This ‘separate but equal’ doctrine was upheld by the Supreme Court.

<sup>413</sup> *Brown v Board of Education of Topeka, Shawnee County, Kan.*, 347 US 483 (1954), the case involves a class action by African-Americans in Kansas, South Carolina, Virginia and Delaware, in order to obtain access to a public school education on a non-segregated basis. As a result, the Supreme Court ended racial segregation in the public school system.

ended racial segregation in public education and the understanding that equality included everyone regardless of race. These various interpretations of the Supreme Court of the United States of the term ‘equality’ over time, and different uses of the Strict Scrutiny Test regarding affirmative action,<sup>414</sup> as shown in the case studies of *Johnson v Transportation Agency* and *Adarand Constructors, Inc. v Peña*, directly influence their application and lead to variations and even contradictions in the outcome of court decisions.

Even though the Supreme Court struggled with setting goals and limitations for affirmative action, it has acknowledged the temporary nature of affirmative action measures in several cases, but struggled again to set any concrete temporal limitations to them. It was illustrated that the use of the Strict Scrutiny Test regarding affirmative action and its limits can vary, depending on its context and its interpretation by the judges of the Supreme Court, which as a consequence, implies the need for a clearer theoretical basis for drawing limits for affirmative action and a methodology to adapt the setting of goal-oriented and temporal limitations regarding continuously changing contexts for these policies over time.<sup>415</sup>

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<sup>414</sup> See also *Grutter v Bollinger*, 539 US 306, 344-5 (2003) stating that ‘[i]t has been 25 years since Justice Powell [in *Regents of Univ. of California v Bakke*, 438 US 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education. See *Hopwood v Texas*, 78 F.3d 932 (C.A.5 1996); cf. *Wessmann v Gittens*, 160 F.3d 790 (C.A.1 1998); *Tuttle v Arlington Cty. School Bd.*, 195 F.3d 698 (C.A.4 1999); *Johnson v Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (C.A.11 2001). Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown v Board of Education*, 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); cf. *Cooper v Aaron*, 358 US 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958)’.

<sup>415</sup> Richard H Fallon claims that ‘there are at least three identifiable versions of strict scrutiny, all subsumed under the same label. The result is uncertainty and sometimes confusion about which version the US Supreme Court will apply in which cases’. Richard H Fallon, ‘Strict Judicial Scrutiny’ (2007) 54 *University of California Law Review* 1267.

### III. ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION

#### A. *Title VII of the Civil Rights Act of 1964*

In the United States, the major anti-discrimination legislation started as a result of the African-American civil rights movement in the 1960s.<sup>416</sup> The goals of the civil rights movement included the implementation of ‘[a]nti-lynching and anti-segregation legislation, voting rights, and equal employment opportunities’.<sup>417</sup> One of the most important anti-discrimination laws is the *Title VII of the Civil Rights Act of 1964*,<sup>418</sup> which prohibits ‘discrimination against any individual because of race, colour, religion, and national origin’,<sup>419</sup> and is administered by the Equal Employment Opportunity Commission (EEOC). In 1972, *Title VII* was amended by the *Equal Employment Opportunity Act 1972*, which extended its application to state and local governments.<sup>420</sup> Furthermore, the *Pregnancy Discrimination Act 1978*, which included medical matters related to pregnancy and childbirth, amended the Act in 1978.<sup>421</sup> Interestingly, despite the fact that *Title VII*<sup>422</sup> does not include any requirement that employers need to implement affirmative action, and focuses on the prevention of discrimination, the Act has been perceived by its opponents as a possible basis for applying quotas in employment.<sup>423</sup> In order to understand this confusing perception, it is necessary to analyse *Title VII* within its historical context.

The ‘longest debate in the history of Congress’ was led during a time when racial segregation was a traditional custom, and the idea of a desegregated workplace

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<sup>416</sup> Hugh Davis Graham, *Civil Rights in the United States* (Pennsylvania State University Press, 2004) 1-3.

<sup>417</sup> Mary Beth Norton et al, *A People and a Nation: a History of the United States* (Wadsworth, 9<sup>th</sup> ed, 2012) 773. In the 20<sup>th</sup> century, the first steps to integrate former segregated African-Americans in mainstream society were taken in 1946 by President Harry Truman.

<sup>418</sup> *Title VII of the Civil Rights Act of 1964*, 42 USC §§ 1981 – 2000h6.

<sup>419</sup> Herman Belz, ‘Equal Protection and Affirmative Action’ in David J Bodenhamer and James W Ely (eds), *The Bill of Rights in Modern America* (Indiana University Press, 2<sup>nd</sup> ed, 2008) 190.

<sup>420</sup> The *Equal Employment Opportunity Act 1972*, 42 USC §§ 2000e – 17 is discussed in detail in subsection 3 (c) under specific affirmative action legislation.

<sup>421</sup> The *Pregnancy Discrimination Act 1978* (Public Law No. 95-555, 92 Stat. 2076, amended in 1988 and codified at 42 U.S.C. 20000) added subsection (k) to section 701 of the *Title VII of the Civil Rights Act of 1964*.

<sup>422</sup> *Title VII of the Civil Rights Act of 1964* is abbreviated as *Title VII* in this thesis.

<sup>423</sup> Francis Graham Lee, *Equal protection: Rights and Liberties under the Law* (ABC Clio, 2003) 70.

seemed full of unknown consequences.<sup>424</sup> Hence, debates about *Title VII* included, inter alia, two main questions. The first debate was about the question of what kind of equality the Act should be upholding. The result was that the idea of substantive equality was rejected in favour of formal equality, and the concept of equal opportunities was upheld.<sup>425</sup> A second debate arose around the question whether or not *Title VII* could lead to racial preferences like timetables or quotas to create a racial balance within the work place.<sup>426</sup> One of the major concerns in Congress was that employers would use quota systems in order to protect themselves from lawsuits.<sup>427</sup> In order to avoid such a scenario section 703(j) was added to *Title VII* to exclude any requirement of ‘preferential treatment to any individual or to any group because of the race, colour, religion, sex, or national origin of such individual or group’, in the event of an imbalance regarding existing numbers or percentages within a workforce. Hence, section 703(j) of *Title VII* clearly states that preferential treatment (affirmative action) is not required by employers in order to remedy a racial or gender imbalance within their workforce.

However, section 706(g) (1) of the Act refers to the term ‘affirmative action’ for the first time, and allows its use in regards to judicial orders. In the event, that an employer ‘intentionally engaged in or is intentionally engaging in an unlawful employment practice’, the court has the power to ‘order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees’.<sup>428</sup> It has to be kept in mind that the term ‘affirmative action’ in *Title VII* refers to taking proactive steps to remedy unlawful discriminatory employment practices, whilst the definition of ‘affirmative action’ used in this thesis is held much broader, and includes multiple remedies, inter alia, the use of numerical goals. Section 706(g) (1) of *Title VII* is limited by section 706(g)(2)(A) which excludes persons who were ‘suspended or

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<sup>424</sup> Hugh Davis Graham, ‘The Civil Rights Act and the American Regulatory State’ in Bernard Grofman (ed), *Legacies of the 1964 Civil Rights Act* (University of Virginia Press, 2000) 49.

<sup>425</sup> Myles J Kelleher, *Social Problems in a Free Society: Myths, Absurdities, and Realities* (United Press of America, 2004) 239.

<sup>426</sup> *Ibid* 239-40.

<sup>427</sup> Jeffrey F Beatty and Susan S Samuelson, *Legal Environment* (Cengage, 4<sup>th</sup> ed, 2011) 79-80.

<sup>428</sup> Initially, the term ‘employer’ in the Act did not include the government. Gregory C Sisk et al., *Litigation with the Federal Government* (American Law Institute – American Bar Association, 4<sup>th</sup> ed, 2006) 195.

discharged for any reason other than discrimination on account of race, colour, religion, sex, or national origin'.<sup>429</sup> Another limitation for court ordered affirmative action is section 703(j) of the Act, which explicitly states that there is no requirement for affirmative action to remedy an imbalance within an employer's workforce. Hence, court ordered preferential treatment for minority groups is clearly limited to only certain discriminatory practices of section 703(a) of *Title VII*,<sup>430</sup> which states that:

- It shall be an unlawful employment practice for an employer –
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, colour, religion, sex, or national origin, or
  - (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex, or national origin.

Even though section 703(a) of *Title VII* is an anti-discrimination measure, it is also used as a basis for the application of a limited form of affirmative action. The Supreme Court developed two theories of discrimination based on section 703(a) of *Title VII*, which are the disparate treatment theory and the disparate impact theory. Disparate treatment is caused by intentional discriminatory treatment, whilst disparate impact is caused by seemingly neutral practices that result in disproportionate, negative impacts on minorities (to avoid employment practices that seem to be 'fair in form, but discriminatory in operation'<sup>431</sup>).<sup>432</sup> Besides the use of the Strict Scrutiny Test (elaborated above under ambiguous constitutional approach) in its dealings with affirmative action, the Supreme

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<sup>429</sup> *Title VII of the Civil Rights Act of 1964*, section 706(g)(2)(A).

<sup>430</sup> Mary F Radford, 'The Affirmative Action Debate' in Bruce E Kaufman (ed.), *Government Regulation of the Employment Relationship* (Cornell University Press, 1997) 353.

<sup>431</sup> *Ricci v DeStefano*, 129 S.Ct. 2658, 2678 (2009).

<sup>432</sup> The analysis of disparate impact of the *Title VII* was firstly used by the Supreme Court 'in employment discrimination cases in *Griggs v Duke Power Co*, 401 US 424 (1971) and disparate treatment analysis in *McDonnell Douglas Corp. v Green*, 411 US 792 (1973). Controversy resulted over the scope and application of the analyses, including whether the nature of the challenged employment practice should dictate which mode of analysis, disparate impact or disparate treatment, should be used to determine if illegal discrimination occurred. In *Watson v Fort Worth Bank and Trust*, 490 US 642 (1988) and *Wards Cove Packing v Atonio*, 109 S.Ct. 2115 (1989), the Supreme Court answered the question by holding that subjective employment practices should be analysed under a modified disparate impact analysis ... with drastically altered burdens of proof'. Robert L Norton, 'The New Disparate Impact Analysis in Employment Discrimination: *Emanuel v Marsh* in Light of *Watson*, *Atonio*, and the Failed Civil Rights Act of 1990' (1991) 56 *Missouri Law Review* 334.

Court also tests for disparate treatment or disparate impact. The disparate impact doctrine was upheld by Congress in amending *Title VII* in the *Civil Rights Act of 1991*. Section 703(k) makes explicit reference to the term ‘disparate impact’.<sup>433</sup> The disparate impact doctrine can be seen as aiming to end ‘racial hierarchy in the workplace’ that is also an ‘[u]nderlying purpose of *Title VII* in statutory affirmative action cases’, which makes this doctrine a ‘cousin of affirmative action’.<sup>434</sup>

The most recent Supreme Court case regarding this matter, *Ricci v DeStefano*,<sup>435</sup> involved white fire-fighters who claimed that a test for promotion, which was failed by minorities on a large scale, and hence cancelled, because of an assumed disparate impact on minority fire-fighters by the test results, should have been declared valid.<sup>436</sup> The disparate impact doctrine became relevant due to the largely negative results of minority fire-fighters in a promotion test. The city involved (New Haven), wanted to avoid a possible disparate impact liability, and therefore refused to certify the test results. The Court ordered that such a practice is only permissible under *Title VII*, if there is strong evidence for a disparate impact liability, stating that:

[*T*]itle VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race ... We hold only that, under *Title VII*, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action [affirmative action policies].<sup>437</sup>

A statistical disparity in test results was not regarded as sufficiently strong evidence by the Court for the application of race-conscious practices (affirmative

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<sup>433</sup> *Civil Rights Act of 1991*, s703(k).

<sup>434</sup> Richard A Primus, ‘Equal Protection and Disparate Impact: Round Three’ (2003) 117 *Harvard Law Review* 524-5.

<sup>435</sup> 129 S Ct 2658, 2678 (2009).

<sup>436</sup> In *Ricci v DeStefano*, the Court issued a 5 to 4 decision in favour of the white fire-fighters claim of validating the promotion test results. Justice Ginsburg, joined by Justice Stevens, Justice Souter, and Justice Breyer were dissenting the Courts findings, by claiming the case had to be assessed within its historical context, which would justify another outcome. In the early 1970s, African-Americans and Hispanics composed 30 percent of New Haven’s population, but only 3.6 percent of the City’s 502 fire-fighters. As of 2003, African-Americans and Hispanics constituted 30 percent and 16 percent of the City’s fire-fighters, respectively. In supervisory positions, however, significant disparities remain: at 2690-1.

<sup>437</sup> *Ricci* (2009) 129 S Ct 2678.

action) and therefore, the test results of the promotion exam had to be validated by the city involved.<sup>438</sup>

This case shows, how the application of affirmative action can be limited by the Supreme Court (in addition to the Strict Scrutiny Test)<sup>439</sup> through balancing the requirements of disparate treatment and disparate impact, by using a strong basis in evidence (the Strong Basis Test) to assess a possible liability of employers in their use of race-conscious practices (affirmative action). The Court stated that the city involved could only be liable regarding disparate impact ‘if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt’.<sup>440</sup> Hence, if these criteria would have been fulfilled, the city involved could have adopted the race-conscious action (affirmative action policy) of cancelling the promotion test results.

However, the Supreme Court was highly divided over the case and could not establish clear rules regarding the Strict Basis Test and the application of voluntary affirmative action under *Title VII*, which ‘leaves considerable uncertainty for future municipalities trying to voluntarily comply with the requirements of *Title VII*.’<sup>441</sup> The Supreme Court made it clear that “fear of litigation alone” does not justify disparate treatment, but where future district courts will draw the line is unclear’.<sup>442</sup> This uncertainty regarding the application of affirmative action under *Title VII* represents a major risk for disparate impact litigation for employers, and hence calls for clearly defined limits for affirmative action in order to enable employers to implement legally appropriate policies.

Overall, the *Title VII* aims to ‘de-emphasize the role of race in the public arena and secure the rights of individuals with equality under the law’, instead of focusing on preferential treatment for minority groups in society.<sup>443</sup> However,

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<sup>438</sup> Ibid.

<sup>439</sup> See also Jared D Stueckle, ‘Title VII, Voluntary Compliance and Ricci: Rescuing Municipalities from a Legal Back-Draft’ (2010) 17 *Duke Journal of Gender Law and Policy* 259-76.

<sup>440</sup> *Ricci* (2009) 129 SCt 2678.

<sup>441</sup> Stueckle, above n 439, 276.

<sup>442</sup> Ibid.

<sup>443</sup> Kelleher, above n 425, 240.



*Title VII* also allows for court ordered affirmative action against employers who violate section 703(a) of the Act. Limitations for affirmative action are outlined in sections 703(j) and 706(g)(2)(a), which exclude these policies as a remedy for employers with an imbalance of minority groups within their workforce, and restricts court-ordered affirmative action only to persons who were suspended or discharged on grounds of race, colour, religion, sex or national origin. Other limitations for affirmative action can be applied by the Supreme Court in regards to the Strict Basis Test and disparate impact litigation based on section 703(a) of the Act.<sup>444</sup> Much uncertainty in the application of affirmative action under *Title VII* (which has also been proven in the case studies in section II) calls for a clearer theoretical basis to define limitations for these measures to provide a better guidance for their implementation by employers in the work place.

In order to further illustrate the way in which limitations to affirmative action have been set, and also to reveal the difficulty the law-makers have encountered in defining limits, the next section investigates limitations of specific affirmative action legislation in the United States.

#### IV. SPECIFIC AFFIRMATIVE ACTION LEGISLATION

In the United States, affirmative action policies were not only introduced by important anti-discrimination legislation like the *Title VII of the Civil Rights Act of 1964*, but also by a series of executive orders and the *Equal Employment Opportunity Act 1972*, which amended *Title VII*.<sup>445</sup> Whilst the *Title VII* and its amendment, the *Equal Employment Opportunity Act 1972*, were enacted by Congress, executive orders are directives issued by the President representing substantial lawmaking power by establishing these executive orders without any

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<sup>444</sup> Radford, above n 430, 346.

<sup>445</sup> Other important anti-discrimination legislation are the *Equal Pay Act of 1963*, 29 USC §§ 206 - 255; the *Age Discrimination in Employment Act of 1967*, 29 USC §§ 621 - 634; the *Civil Rights Act of 1968*, 25 USC § 1302; the *Rehabilitation Act of 1973*, 29 USC § 701; the *Americans with Disabilities Act of 1990*, 42 USC § 12101; and the *Civil Rights Act of 1991*, 42 USC § 1981(a) - 2000 (d).

influence of the Congress or the courts.<sup>446</sup> However, succeeding presidents have the possibility and power to revoke executive orders of a former president.<sup>447</sup> The most important executive orders in regards to affirmative action are *Executive Orders 10925* and *11246*, which are investigated together with the *Equal Employment Opportunity Act 1972*, regarding their limitations, in the following subsections.

### A. *Executive Order 10925*

The *Executive Order 10925* was signed by U.S. President John F. Kennedy on 6 March 1961. It required to take ‘additional affirmative steps’ to improve ‘the national policy of non-discrimination within the executive branch of the Government’.<sup>448</sup> Initially, the term ‘affirmative steps’ did not represent the political idea of proactive measures to integrate historically disadvantaged groups, but was a rather unspecified attempt to address discrimination in employment regarding race, creed, colour, and national origin, which ‘only pointed toward an effective intervention of some kind, as opposed to merely symbolic gestures and sheer passivity’ in the matter.<sup>449</sup> This ‘generic appellation for the still partly undefined set of remedial measures’ did not change during the implementation of *Title VII* or even *Executive Orders 10925* and *11246*, which all referred to a very basic idea of affirmative action, that had little to do with today’s idea of ‘a new governmental strategy of racial integration departing from the principle of non-discrimination in the *1964 Civil Rights Act*’.<sup>450</sup> This understanding of affirmative action changed over time along with the development of governmental agencies and case law regarding these policies, which is further investigated in section V (implementation of affirmative action) of this chapter.

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<sup>446</sup> Executive orders are ‘legal instruments that create or modify laws, procedures, and policy by fiat’. Therefore, even though the *United States Constitution* ‘unambiguously vests the legislative function in Congress, the President’s lawmaking role is substantial’. Kenneth R Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Powers* (Princeton University Press, 2002) 4-5.

<sup>447</sup> Ibid 89.

<sup>448</sup> *Executive Order 10925*, ss101, 201 (1961).

<sup>449</sup> Daniel Sabbagh, ‘Judicial Uses of Subterfuge: Affirmative Action Reconsidered’ (2003) 118 *Political Science Quarterly* 3, 412-3.

<sup>450</sup> Ibid 413.

*Executive Order 10925* established the President's Committee on Equal Employment Opportunities, which had as one of its main functions to analyse employment practices of the government in order to give advice on how discrimination in employment could be addressed positively. The recommendations of the Committee<sup>451</sup> focused on measures to eliminate direct and indirect discrimination and reports about the progress in this matter had to be submitted annually to the President.<sup>452</sup> Altogether, the Committee focused on affirmative hiring and training in employment, and kept close contact with civil rights groups.<sup>453</sup>

The *Executive Order 10925* applied both to the executive branch of the government, but also to government contractors and subcontractors.<sup>454</sup> These contractors were obliged to apply affirmative action to guarantee non-discriminatory behaviour regarding race, creed, colour, and national origin in all employment matters.<sup>455</sup> In order to monitor the adequate application of *Executive Order 10925*, contractors were required to submit so-called Compliance Reports, which had to include information about the 'practices, policies, programs and employment statistics of the contractor and each subcontractor'.<sup>456</sup> The Committee had the power to investigate any contractor and subcontractor to detect any violations of *Executive Order 10925*.<sup>457</sup> As a consequence of non-compliance, the Committee could cancel government contracts and contractors could be declared ineligible for future government contracts.<sup>458</sup> The Committee could also reward contractors who implemented the *Executive Order 10925* in an appropriate manner with Certificates of Merit.<sup>459</sup>

Altogether, the *Executive Order 10925* required the executive branch of the government as well as its contractors and subcontractors to take affirmative

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<sup>451</sup> The term 'Committee' is used as an abbreviation for the President's Committee on Equal Employment Opportunity.

<sup>452</sup> *Executive Order 10925 (EO 10925)*, ss103, 202 (1961).

<sup>453</sup> J Edward Kellough, 'Affirmative Action in Government Employment' (1992) 523 *Annals of the American Academy of Political and Social Science* 122.

<sup>454</sup> Owen Birnbaum, 'Equal Employment Opportunity and Executive Order 10925' (1962) 11 *Kansas Law Review* 18.

<sup>455</sup> *EO 10925*, s 301(1).

<sup>456</sup> *Ibid* s302(a).

<sup>457</sup> *Ibid* s309(a).

<sup>458</sup> *Ibid* s301(6).

<sup>459</sup> *Ibid* s316.

steps, which were rather unspecified, to ensure non-discrimination in relation to race, creed, colour or national origin in employment. Women were not included in this executive order. Furthermore, its emphasis was on preventing discrimination from occurring, rather than implementing proactive measures to advance the opportunities of historically discriminated groups in employment.

### **B. Executive Order 11246**

The *Executive Order 10925* was superseded by *Executive Order 11246*,<sup>460</sup> which was signed by U.S. President Lyndon B. Johnson on 24 September 1965, and delegated enforcement responsibilities over equal employment opportunities in government employment to the Civil Service Commission.<sup>461</sup> *Executive Order 11246* required contractors and subcontractors of the Government to implement affirmative action.<sup>462</sup> In 1967, *Executive Order 11246* was amended by *Executive Order 11375*,<sup>463</sup> which added a prohibition of discrimination on the basis of sex.<sup>464</sup>

The Civil Service Commission was replaced by the Office of Personnel Management by the *Civil Service Reform Act of 1978*, and had to share its responsibility in administering and enforcing *Executive Order 11246* with the Secretary of Labor.<sup>465</sup> The powers of the Secretary of Labor included the authority to issue rules and regulations as well as to refer functions or duties to the executive branch of the Government.<sup>466</sup> In the exercise of this authority, the Secretary of Labor established the Office of Federal Contract Compliance (OFCC) to execute relevant duties.<sup>467</sup> The OFCC established the so-called ‘Philadelphia Plan’, which addressed employment discrimination of historically disadvantaged groups in the construction industry and included for the first time

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<sup>460</sup> *Executive Order 11246 (EO 11246)*, s403a (1965).

<sup>461</sup> Kellough, above n 453, 123.

<sup>462</sup> *EO 11246*, s202(1).

<sup>463</sup> *Executive Order 11375*, which was issued on 13 October 1967, amended *Executive Order 11246* and superseded partly *Executive Order 11478*.

<sup>464</sup> *Executive Order 11375 (3)*, see also Finis Welch, ‘Affirmative Action and Its Enforcement’ (1981) 71 *American Economic Review* 2, 127.

<sup>465</sup> *EO 11246*, ss201, 403a. (1965).

<sup>466</sup> *Ibid* s401.

<sup>467</sup> James R Beard, ‘Seventh Annual Labour Law Symposium – Racial Discrimination in Employment: Rights and Remedies’ (1972) 6 (3) *Georgia Law Review* 470.

goals and timetables.<sup>468</sup> These goals and timetables consisted of ‘specified certain target levels for the employment of minorities in the various construction crafts, as well as a time period over which the targets were to be met’.<sup>469</sup> In time, this concept of goals and timetables in regards to equal employment opportunities became a ‘staple for inclusion in conciliation agreements, both in and outside the construction industry’.<sup>470</sup> In 1978, the OFCC was superseded by the Office of Federal Contract Compliance Programs (OFCCP), which is responsible for the administration and enforcement of *Executive Order 11246* today.<sup>471</sup>

In comparison to *Executive Order 10925*, *Executive Order 11246* delegated its enforcement and administration duties to another agency, which was at first the OFCC, followed by the OFCCP in 1978. The inclusion of gender as a discriminatory factor in employment as well as its focus on the construction industry represents its major differences to *Executive Order 10925*. Similarities between the two executive orders comprise the obligations of contractors to the government, the consequences of non-compliance,<sup>472</sup> the requirement to submit Compliance Reports,<sup>473</sup> and the issuance of Certificates of Merit for complying employers, labour unions and contractors.<sup>474</sup>

Overall, *Executive Order 11246* itself does not contain any limitations regarding its application, no quotas or outcome goals. Besides the duty of submitting a Compliance Report and the description of the procedure that is involved with it, this Executive Order does not include any further limits. The *Executive Orders 10925* and *11246* do not state any kind of limitations for their affirmative action policies, which were originally meant to be proactive colour-blind measures outlined in a general terms, but led under *Executive Order 11246* to the numerical goals and timetables that were first implemented in the Philadelphia

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<sup>468</sup> Bernard E Anderson, ‘The Ebb and Flow of Enforcing Executive Order 11246’ (1996) 86 *American Economic Review* 2, 299. The “Philadelphia Plan” will be further elaborated under section V, B, 2.

<sup>469</sup> Ibid.

<sup>470</sup> Ibid.

<sup>471</sup> John J Donohue III and James Heckman, ‘Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks’ in Paul Burstein (ed), *Equal Employment Opportunity: Labour Market Discrimination and Public Policy* (1994) 197.

<sup>472</sup> *EO 11246*, s202(6).

<sup>473</sup> Ibid s203a.

<sup>474</sup> Ibid s213.

Plan. However, as part of the duties and responsibilities of the Secretary of Labour, the OFCCP was established, the rules and regulations of which entail more detailed goals and timetables for affirmative action. These are investigated in subsection V, B, 2 of this chapter.

### ***C. Equal Employment Opportunity Act of 1972***

The *Equal Employment Opportunity Act of 1972* amends the *Title VII* by extending its application to most state and local government employees and federal agencies to increase the representation of women and minorities in federal employment.<sup>475</sup> The *EEOA 1972*<sup>476</sup> also applies to political subdivisions, labour unions and organisations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organisations, trustees, employment agencies and employers with more than 15 employees.<sup>477</sup> Apart from the *EEOA 1972*, the *Executive Order 11246* and its enforcement agency remained in effect.<sup>478</sup>

The administration and enforcement of the *EEOA 1972* is executed by the Equal Employment Opportunity Commission (EEOC), the main functions of which are to issue rules and regulations, prepare annual reviews, approve national and regional equal employment opportunity plans, review and evaluate equal employment opportunity programs and publish progress reports.<sup>479</sup> The *EEOA 1972* has given the EEOC the authority to file its own suits,<sup>480</sup> which empowers it to remedy individual discrimination, not only systemic discrimination, which is still an ‘area of emphasis’, in the fight against discrimination in the workforce.<sup>481</sup> Before this empowerment to file its own lawsuits, the EEOC could

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<sup>475</sup> David L Rose, ‘25 Years Later: Where Do We Stand On Equal Employment Opportunity Law Enforcement?’ (1989) 42 *Vanderbilt Law Review* 4, 1149.

<sup>476</sup> The abbreviation EEOA 1972 is used for the *Equal Employment Opportunity Act of 1972*, 42 USC §§ 2000e - 17.

<sup>477</sup> *Equal Employment Opportunity Act of 1972 (EEO 1972)*, s2000e (a), (b).

<sup>478</sup> J Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination and the Search for Justice* (Georgetown University Press, 2006) 43.

<sup>479</sup> *EEO 1972*, s2000e-16 (b).

<sup>480</sup> Rose, above n 468, 4, 1149.

<sup>481</sup> Clarence Thomas, ‘Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!’ (1987) 5 *Yale Law & Policy Review* 2, 404-5.

only settle for voluntary conciliation agreements.<sup>482</sup> The *EEOA 1972* forbids discriminatory practices in employment matters based on race, colour, religion, sex or national origin, and promotes affirmative action on a national and regional level.<sup>483</sup>

Furthermore, the *EEOA 1972* lists various examples of prohibited discriminatory behaviour in employment, which as a result can also limit the application of certain types of affirmative action. For example, it does not allow employers to adjust or alter any test scores for applicants or candidates of particular race, colour, religion, sex, or national origin in their applications for employment or promotion.<sup>484</sup> Besides a long list of forbidden discriminatory behaviour, the *EEOA 1972* does not state explicitly how affirmative action plans have to be established. However, it does prohibit preferential treatment on account of existing number or percentage imbalances of employees in regards to race, colour, religion, sex or national origin in the workforce of an employer.<sup>485</sup>

None of the *Title VII* the *Executive Orders 10925* and *11246*, or the *EEOA 1972*, that amended *Title VII*, clearly define limitations for affirmative action. They all place some restrictions on what types of affirmative action can be implemented and in doing so make it clear that some bases for the distinction between people are unacceptable. This helps clarify that are acceptable limits for affirmative action under these schemes to a small extent, but leave largely undefined the criteria for affirmative action and the criteria for its end point. In particular, these laws do not include any temporal limitations. There is nothing stated about whether or not affirmative action policies and legislation are designed to last indefinitely or have temporal limitations to them.

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<sup>482</sup> *EEO 1972*, s2000e-5(a) – (g), see also Mary Kathrin Lynch, ‘The Equal Employment Opportunity Commission: Comments on the Agency and its Role in Employment Discrimination Law’ (1990) 20 *Georgia Journal of International and Comparative Law* 1, 93.

<sup>483</sup> *EEO 1972*, s2000e-2 (a).

<sup>484</sup> *EEO 1972*, s2000e-2 (l).

<sup>485</sup> *EEO 1972*, s2000e-2 (j).

## V. IMPLEMENTATION OF AFFIRMATIVE ACTION

Affirmative action has survived long past its life expectancy only because it has developed a cadre of individuals and organizations who are so heavily invested in its immortality that, like the die-hard segregationists, they simply refuse to let it go without a bitter fight.<sup>486</sup>

In order to translate affirmative action legislation into practical operation, several governmental agencies were established, which issue rules and regulations to ensure an adequate application of these policies by employers. In this part of the chapter I investigate the operation of the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP), with a focus on *Title 29 of the Code of Federal Regulations (CFR)* and on *Title 41 of the Code of Federal Regulations (CFR)*.<sup>487</sup> These regulations and guidance rules are designed to avoid ‘reverse discrimination’ claims ‘by males and non-minorities excluded’<sup>488</sup> from affirmative action.<sup>489</sup> Such a situation can occur, if an employer applies affirmative action in regards to race or gender, and is being sued on the basis of *Title VII* for doing so. Interestingly, this can happen even though the employer aims to comply with *Title VII*. This is caused by the confusing situation that ‘both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based on the principles of *Title VII*’.<sup>490</sup> Therefore, regulations and guidelines have been established to ‘[c]larify and harmonize the principles of *Title VII* in order to protect those employers, labour organizations, and other persons’ who are implementing affirmative action policies under *Title VII*.<sup>491</sup> Whilst the EEOC administers *Title VII*, the OFCCP covers the executive orders regarding affirmative action policies in relation to government employment and government contracting.<sup>492</sup>

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<sup>486</sup> Ward Connerly, ‘It is Time to End Race-Based “Affirmative Action” (2007) 1 *University of St Thomas Journal of Law & Public Policy* 62.

<sup>487</sup> The Code of Federal Regulations is abbreviated with CFR for this thesis.

<sup>488</sup> Michael K Braswell, Gary A Moore, and Stephen L Poe, ‘Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy’ (1993) 57 *Albany Law Review* 374.

<sup>489</sup> 29 CFR §1608.1(a).

<sup>490</sup> Ibid.

<sup>491</sup> Ibid.

<sup>492</sup> However, the EEOC may also monitor affirmative action policies regarding *Executive Order 11246*.



### A. *Equal Employment Opportunity Commission (EEOC)*

The EEOC was established by *Title VII* and enforces federal legislation that prohibits employment discrimination in many areas.<sup>493</sup>

The EEOC also issues rules and guidance regulations for the voluntary implementation of affirmative action programs by employers.<sup>494</sup> These rules and guidelines provide valuable advice of how to avoid disparate impact liabilities for employers and assist with the proper establishment of legally acceptable affirmative action programs.

In 1972, Congress extended the EEOC's enforcement powers in its amendment to *Title VII* – the *EEOA 1972*. The main functions of the EEOC are the 'investigation and conciliation of possible violations; enforcement of *Title VII*; issuance of official guidelines and interpretation of major segments of *Title VII*; and implementation of enforcement proceedings against federal employers'.<sup>495</sup>

This part of the thesis focuses on Title 29 of the *CFR*, which includes in chapter XIV the regulations of the Equal Employment Opportunity Commission regarding the question of what kind of affirmative action programs are appropriate under *Title VII*.<sup>496</sup>

The EEOC considers the purpose of *Title VII* to be to combine and balance the goal of non-discrimination in employment in regards to race, gender, religion, or national origin and the goal of correcting the effects of past discrimination and to prevent present and future discrimination. The EEOC regards these goals as 'mutually consistent and interdependent methods of addressing social and economic conditions'.<sup>497</sup> Therefore, the EEOC believes that '*Title VII* must be

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<sup>493</sup> For example, the *Pregnancy Discrimination Act*, 42 USC §§ 2000e - 2, the *Equal Pay Act of 1963*, the *Age Discrimination in Employment Act of 1967*, *Title I of the Americans with Disabilities Act of 1990*, Sections 102 and 103 of the *Civil Rights Act of 1991*, Sections 501 and 505 of the *Rehabilitation Act of 1973*, the *Genetic Information Non-Discrimination Act of 2008*, 42 USC § 2000 (ff) - 10 and the *Title VII* itself.

<sup>494</sup> 29 CFR §1608.1(c) (1995).

<sup>495</sup> Marcia M Boumil et al, *Women and the Law* (United States of America Press, 1992) 397.

<sup>496</sup> These regulations are given authority by section 713 of the *Civil Rights Act of 1964*, as amended, 42 USC 2000e-12, 78 Stat 265, which states in section 713 (a) that: '[t]he Commission shall have the authority from time to time to issue, amend or rescind suitable procedural regulations to carry out the provisions of this subchapter'.

<sup>497</sup> 29 CFR §1608.1(c).

construed to permit voluntary action [affirmative action], and those taking such action should be afforded the protection against *Title VII* liability which the Commission is authorized to provide under section 713 (b) (1)'.<sup>498</sup>

The EEOC declares affirmative action appropriate only if certain conditions apply, which were over time also approved by the United States Supreme Court.<sup>499</sup> Firstly, an analysis of an employer's business has to prove that an 'actual or potential adverse impact' exists, which likely results from 'existing or contemplated practices' in the business.<sup>500</sup> Secondly, employers are allowed to take affirmative action to 'correct the effects of prior discriminatory practices', which can be identified by 'a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labour force'.<sup>501</sup> Thirdly, employers with businesses in historically restricted labour pools are allowed to take affirmative action to enhance equal opportunities for minorities and women, for example, by implementing special training programs, or applying 'extensive and focused recruiting activity'.<sup>502</sup> The establishment of affirmative action plans or programs has to include a reasonable self-analysis, which serves the purpose of determining whether or not adverse impacts and discriminatory employment patterns exist in the business.<sup>503</sup>

In order to resolve discriminatory issues, 'reasonable action' has to be taken, which directly addresses a certain discriminatory problem that was disclosed in the self-analysis of the business.<sup>504</sup> This 'reasonable action' can include, but is not limited to:

[T]he establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into

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<sup>498</sup> Ibid.

<sup>499</sup> The Supreme Court has acknowledged the compatibility of affirmative action policies and *Title VII* in several cases. In *Griggs v Duke Power*, 401 US 424 (1971), the Court held that discriminatory practices that have an adverse impact on employees are only acceptable as a business necessity for job performances: at 431; in *United Steelworkers of America v Weber*, 443 US 193 (1979), the Court ruled that *Title VII* left a certain discretion to '[t]he private sector to voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories' [which means for remedial purposes]: at 209.

<sup>500</sup> 29 CFR §1608.3(a).

<sup>501</sup> Ibid §1608.3(b).

<sup>502</sup> Ibid §1608.3(c) (1)-(4).

<sup>503</sup> Ibid §1608.4(a).

<sup>504</sup> Ibid §1608.4(c).

account the availability of basically qualified persons in the relevant job market ... and the establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.<sup>505</sup>

The EEOC states that affirmative action plans or programs ‘[s]hould be tailored to solve the problems that were identified in the self-analysis ... to ensure that employment systems operate fairly in the future’ and that ‘[t]he race, sex, and national origin conscious provisions [affirmative action] should be maintained only so long as is necessary to achieve these objectives’.<sup>506</sup> In addition, ‘[g]oals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment’ as well as the labour market situation regarding employment opportunities and the number of qualified applicants for them.<sup>507</sup>

These requirements clearly indicate that all affirmative action plans and programs are supposed to have an end point, which is reached as soon as their objectives are successfully achieved. In order to determine when this point in time is reached, the EEOC recommends the application of a monitoring system regarding the effectiveness of an affirmative action program. This procedure assists employers to detect possible flaws in their affirmative action programs and enables them to make necessary adjustments where needed. Further limitations are outlined in section 1608.11, which refers to the ‘limitations on the application of these guidelines’.<sup>508</sup>

Overall, the Title 29 of the *CFR* includes long-term and interim goals for voluntary affirmative action plans and programs in employment. In addition, their temporary nature is acknowledged by the expectation that the plans and programs only need to be applied as long as they are deemed a necessity. The establishment of monitoring systems for the effectiveness of the employers’ affirmative action programs ensures that adjustments can be made as frequently as necessary to achieve their goals as soon as possible, so that at last, they can be

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<sup>505</sup> Ibid §1608.4(c) (1).

<sup>506</sup> Ibid §1608.4(c) (2) (i).

<sup>507</sup> Ibid §1608.4(c) (2) (ii).

<sup>508</sup> Ibid §1608.11a(a)-(c).

ended. Hence, the mandatory requirement of goals and timetables including temporal limitations for an affirmative action policy outlined in chapter XIV of *Title 29 of the CFR* makes these policies ‘real’ affirmative action in the spirit of CERD and CEDAW, because they include all of the essential elements necessary for them (as elaborated in Chapter 2 of this thesis).

### **B. Office of Federal Contract Compliance Programs (OFCCP)**

The Office of Federal Contract Compliance (OFCC), later renamed the Office of Federal Contract Compliance Programs (OFCCP), is a governmental agency of the Department of Labour, which ensures the compliance of federal contractors and subcontractors with *Executive Order 11246* regarding the implementation of affirmative action programs.<sup>509</sup> This part of the thesis investigates *Title 41 of the CFR* which contains the regulations of the OFCCP in regards to federal contractors and affirmative action.<sup>510</sup> The Title 41 of the *Code of Federal Regulations* covers federal non-construction contractors, and construction contractors<sup>511</sup> in regards to race, gender, Vietnam veterans and persons with disabilities. Title 41, section 60-1.4 CFR outlines the equal employment opportunity clause that all federal contractors and subcontractors have to include in their contracts, stating that:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, colour, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, colour, sex, or national origin. Such action shall include, but is not limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

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<sup>509</sup> 41 CFR § 60-1.4.

<sup>510</sup> *Ibid* § 60-3.18.

<sup>511</sup> The term ‘contractor’ also includes the term ‘subcontractor’ in this part of the thesis.

The regulations of Title 41<sup>512</sup> for non-construction contractors (service and supply), and construction contractors to the federal government are mostly similar, but also contain certain differences in the application of goals and timetables. The following investigation is therefore divided into two parts, distinguishing between those two types of federal contractors.

### **1. *Non-Construction Contractors (Supply and Service)***

In order to establish affirmative action plans, contractors have to ‘develop and maintain a written affirmative action program (AAP)’.<sup>513</sup> This applies to non-construction contractors (supply and service), which have more than 50 employees, and a contract of \$50,000 or more.<sup>514</sup> These affirmative action programs have to be developed ‘within 120 days from the commencement of a contract and must be updated annually’.<sup>515</sup> Their purpose is to achieve that ‘[o]ver time a contractor’s workforce will reflect the gender, racial and ethnic profile of the labour pools from which the contractor recruits and selects’ including a monitoring and reporting system.<sup>516</sup> Therefore, affirmative action plans include qualitative analyses to assess the composition of a contractor’s workforce.<sup>517</sup> In the event that minorities and women are employed at a rate which is regarded as too low, this underutilisation has to be addressed by ‘specific practical steps’.<sup>518</sup>

The qualitative analyses, which have to be included in affirmative action programs, are an organisational profile,<sup>519</sup> a job group analysis,<sup>520</sup> the placement of incumbents in job groups,<sup>521</sup> the determination of availability,<sup>522</sup> a comparison

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<sup>512</sup> 41 CFR § 60-20.1.

<sup>513</sup> Ibid § 60-1.12(b).

<sup>514</sup> Ibid § 60-1.40(a)(1).

<sup>515</sup> Ibid § 60-2.1(c).

<sup>516</sup> Ibid § 60-2.10(a)(1).

<sup>517</sup> Ibid.

<sup>518</sup> Ibid.

<sup>519</sup> Ibid § 60-2.11(a).

<sup>520</sup> A group analysis ‘is a method of combining job titles within the contractor’s establishment. This is the first step in the contractor’s comparison of the representation of minorities and women in its workforce with the estimated availability of minorities and women qualified to be employed’: 41 CFR § 60-2.12(a).

<sup>521</sup> 41 CFR § 60-2.13.

<sup>522</sup> Ibid § 60-2.14(a).

of incumbency and availability,<sup>523</sup> and placement goals.<sup>524</sup> In addition, these programs must include a designation of responsibility for implementation,<sup>525</sup> the identification of problem areas,<sup>526</sup> action-oriented programs,<sup>527</sup> and periodic internal audits.<sup>528</sup> Inspection records have to be maintained by contractors to identify their compliance with Title 41<sup>529</sup> in regards to women and minorities, including, inter alia, ‘Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders) and many more.’<sup>530</sup>

The placement goals for affirmative action programs serve as targets and are also used to measure the program’s progress in achieving them.<sup>531</sup> These placement goals have to be established for a particular job group in the form of a ‘percentage annual placement goal’, which must at least be ‘equal to the availability figure derived for women and minorities, as appropriate, for that job group’.<sup>532</sup> Generally, a placement goal is set as a ‘single goal for all minorities’.<sup>533</sup> The placement goals are not allowed to be implemented as rigid quotas, which are expressly forbidden.<sup>534</sup> Furthermore, the contractor has to ‘make selections in a non-discriminatory manner’, and is forbidden from ‘[c]reat[ing] set-asides for specific groups ... to achieve proportional representation or equal results’.<sup>535</sup> In addition, it is forbidden to create an adverse impact on certain groups through the job selection process.<sup>536</sup> Such an adverse impact is suggested if the selection rate for ‘[a]ny race, sex or ethnic group ... is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate ... by the Federal enforcement agencies’.<sup>537</sup> It is also prohibited to ignore the merit principle in favour of affirmative action programs, which means

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<sup>523</sup> Ibid §§ 60-2.15(a)(b), 60-2.16.

<sup>524</sup> Ibid § 60-2.10(b)(1).

<sup>525</sup> Ibid § 60-2.17(a).

<sup>526</sup> Ibid § 60-2.17(b).

<sup>527</sup> Ibid § 60-2.17(c).

<sup>528</sup> Ibid § 60-2.10(b)(2).

<sup>529</sup> Ibid § 60-20.1.

<sup>530</sup> Ibid § 60-3.4(B).

<sup>531</sup> Ibid § 60-2.16(a).

<sup>532</sup> Ibid § 60-2.16(c).

<sup>533</sup> Ibid § 60-2.16(d).

<sup>534</sup> Ibid § 60-2.16(e)(1).

<sup>535</sup> Ibid § 60-2.16(e)(2)-(3).

<sup>536</sup> Ibid § 60-3.4(C).

<sup>537</sup> Ibid § 60-3.4(D).

that no contractor is required to hire a person who is not qualified for the job.<sup>538</sup> Other limitations are mentioned in regards to the scope of application of these regulations to certain groups, for example, American Indians.<sup>539</sup> In regards to temporary limitations, several time periods for enforcement procedures are included in Title 41,<sup>540</sup> but nothing indicates when or whether Title 41<sup>541</sup> is meant to end at a particular point in time. However, a temporal limit is implied in these regulations, given the fact that affirmative action programs ‘must be ... updated annually’ in form of a program summary which has to be submitted to the ‘OFCCP each year on the anniversary date of the affirmative action program’.<sup>542</sup>

Overall, non-construction government contractors have to implement a monitoring system in order to prevent a possible underutilisation in regards to the employment of women and minorities, which constitutes a permanent feature during a contract term with the government. If such an underutilisation (which is reached if eighty percent of the rate for the group with the highest rate is undercut) should occur anyway, the employer involved cannot simply apply numerical goals for women or minorities to help the situation, but has to follow normal hiring procedures using sex or race as one of many factors to be considered. One could argue, that there is an end point to affirmative action as soon as the adverse impact is resolved, which would be different to the usual long-term or interim goal-oriented and temporal affirmative action measures used under *Title 29 CFR*). On the other hand, such an assumed end point would imply that each time a new underutilisation is discovered, a new ‘cycle’ of the application of affirmative action would begin until resolved again in order to maintain a completely balanced workforce during the duration of the government contract. Such a ‘negative limit’, as opposed to ‘positive limits’ which further equal opportunities with long-term or interim and temporal goals under *Title 29 CFR*, would have to satisfy the requirement of being a temporal measure in order to pass as affirmative action based on *CERD* and *CEDAW*.

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<sup>538</sup> Ibid § 60-2.16(e)(4).

<sup>539</sup> Ibid § 60-3.2 (D)-(E).

<sup>540</sup> Ibid § 60-20.1.

<sup>541</sup> Ibid.

<sup>542</sup> Ibid § 60-2.31.

Whether or not this is a valuable option, depends also on the opinion of the Supreme Court, which ruled in *Johnson v Transportation Agency*<sup>543</sup> in favour of an affirmative action program of a public employer under *Title VII* that did not have an explicit end point by stating that ‘express assurance that a program is only temporary may [only] be necessary if the program actually sets aside positions according to specific numbers’.<sup>544</sup> However, as is discussed above, the Court only allowed this lack of a temporal limitation because ‘the Agency [did] not seek to use its Plan to maintain a permanent racial and sexual balance’.<sup>545</sup> In contrast to *Johnson v Transportation Agency*,<sup>546</sup> the whole purpose of affirmative action in *Title 41 CFR* is to maintain a permanent balanced workforce in regards to sex and race. Therefore it might be questionable whether a ‘negative’ limit for affirmative action, as explained above, is a viable legal option.<sup>547</sup>

## **2. Construction Contractors**

The affirmative action requirements for construction contractors apply to ‘[a]ll contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of \$10,000 ... including those construction employees who work on a non-Federal or non-federally assisted construction site’.<sup>548</sup> Affirmative action programs can involve certain specified steps, which have to be documented by the contractor, for example, the establishment of a harassment-free environment for women, which includes the assignment of at least two women to each construction project; the maintenance of an updated list of minority and female recruitment sources; the development of on-the-job training opportunities; the submission of an annual review meeting about the company’s progress with its affirmative action programs; the direction of recruitment efforts towards women and minorities; and the conduction of an annual review of the performance of supervisors under the Contractor’s affirmative action obligations.<sup>549</sup>

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<sup>543</sup> 480 US 616 (1987).

<sup>544</sup> *Ibid* 639-40.

<sup>545</sup> *Ibid* 640.

<sup>546</sup> *Ibid* 616.

<sup>547</sup> This issue is further elaborated in Chapter 7 of this thesis.

<sup>548</sup> 41 CFR § 60-4.1.

<sup>549</sup> *Ibid* § 60-4.3(a)(7)(a)-(p).



Construction contractors have to set up goals and timetables for women and minorities ‘expressed in percentage terms for the Contractor’s aggregate workforce in each trade on all construction work in the covered area’.<sup>550</sup> In contrast to the goals of non-construction contractors, these goals have to be outlined annually, defining goals for minorities and goals for women separately.<sup>551</sup> The term ‘minority’ includes the same groups for contracts of non-construction contractors and construction contractors.<sup>552</sup> Construction contractors’ goals are monitored by the periodic publication of these goals.<sup>553</sup> Furthermore, construction contractors are expected to make substantial progress towards the achievement of these goals.<sup>554</sup>

In order to implement affirmative action programs in projects of federal construction contractors, so-called ‘Hometown-Plans’, also referred to as ‘Imposed Plans’, and ‘Special Bid Conditions’ for ‘high impact projects constructed in areas not covered by a Hometown or an Imposed Plan’, have been established.<sup>555</sup> The first example of such a Hometown Plan was the Philadelphia Plan, which included specific goals and timetables for equal employment opportunities in the construction industry in the Philadelphia area. At this time in history, the construction industry ‘was especially non-compliant in employing African-Americans’ and other minorities, which led former President Nixon to enforce more specific goals and timetables in form of target ranges.<sup>556</sup> In 1969, the first version of the Philadelphia Plan was revised to include that ‘(1) the government, not the contractor, determines the existence of deficiencies, (2) the government decides on goals and timetables, with which the contractor must tentatively commit himself to comply, and (3) these goals and timetables are

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<sup>550</sup> Ibid § 60-4.2(d)(2).

<sup>551</sup> Ibid.

<sup>552</sup> Ibid § 60-4.3(a)(1)(d).

<sup>553</sup> Ibid § 60-4.3(a)(4).

<sup>554</sup> Ibid.

<sup>555</sup> Ibid § 60-4.4(a).

<sup>556</sup> Patricia A Carlson, ‘Adarand Constructors, Inc v Pena: the Lochnerization of Affirmative Action’ (1996) 27 *Saint Mary’s Law Journal* 430-1.

required as a condition precedent to competing for a contract'.<sup>557</sup> The revised Philadelphia Plan served as a model for all following Hometown Plans.<sup>558</sup>

Construction contractors of a '[H]ometown Plan (including heavy highway affirmative action plans) have 45 days ... to submit under such a Plan ... goals and timetables for women and to include female representation on the Hometown Plan Administrative Committee'.<sup>559</sup> The construction contractors are bound to their goals and timetables for women and minorities, even if, 'the OFCCP terminates or withdraws its approval of a Hometown Plan'.<sup>560</sup> These goals and timetables are issued, from time to time by the OFCCP and are based on 'appropriate workforce, demographic or other relevant data and which shall cover construction projects or construction contracts performed in specific geographical areas'.<sup>561</sup>

Altogether, the OFCCP outlines the implementation of goals and timetables for women and minorities in Title 41<sup>562</sup> for construction contractors of the United States government, which depend on the geographical area where the project is pursued. Moreover, Title 41<sup>563</sup> intends to encourage the implementation of affirmative action programs, not only for those who are obliged to use them due to their contracting obligations with the United States Government, but also for those employers 'who have no obligation under Federal law to adopt them'.<sup>564</sup> The OFCCP regards the voluntary implementation of affirmative action programs as equally essential to the enforcement of the obligations of federal contractors, and states that '[t]he importance of voluntary affirmative action on the part of employers is underscored by *Title VII, Executive Order 11246*, and related laws and regulations – all of which emphasize voluntary action to achieve equal employment opportunity'.<sup>565</sup> Furthermore, the OFCCP acknowledges that

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<sup>557</sup> Harvard Law Review Association, 'The Executive Order Program' (1971) 84 *Harvard Law Review* 1296-7.

<sup>558</sup> Carl L Livingston, 'Affirmative Action on Trial: the Retraction of Affirmative Action and the Case for its Retention' (1996) 40 *Howard Law Review* 149 (citing footnote 24).

<sup>559</sup> 41 CFR § 60-4.4(b).

<sup>560</sup> *Ibid.*

<sup>561</sup> *Ibid* § 60-4.6.

<sup>562</sup> *Ibid* § 60-20.1.

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid* § 60-3.13(B).

<sup>565</sup> *Ibid* § 60-3.17(1).

‘affirmative action cannot be viewed as a standardised program which must be accomplished in the same way at all times in all places’.<sup>566</sup>

### ***C. Differences in Applying Limits for Affirmative Action***

It has been illustrated that even though the EEOC and the OFCCP both set limitations for affirmative action programs, these programs differ from each other in regards to their goals and temporal limitations. The EEOC issues rules and guidance regulations in form of the *Title 29 CFR* for the voluntary implementation of affirmative action programs by employers under *Title VII*, which include long-term or interim goals, and also imply a temporal end point by recognising that these programs only need to be applied as long as they are regarded as necessary. This temporal character is also implied in the monitoring processes of these regulations, which are established to permanently assess whether or not the applied affirmative action programs are effective in order to end them as soon as they have achieved their goals. Hence, the established regulations under *Title 29 CFR* comply with the requirements for affirmative action based on CERD and CEDAW, and can therefore be regarded as legitimate affirmative action measures.

Whilst the EEOC focuses on the implementation of voluntary affirmative action programs under *Title VII*, the OFCCP is based on *Executive Order 11246* and administers the mandatory implementation of affirmative action programs in government contracting outlined in *Title 41 CFR*. The OFCCP differentiates between non-construction contractors (supply and service) and construction contractors of the federal government. Goals and timetables for non-construction contractors regarding minorities and women are set as a percentage annual placement goal which includes a single goal for all minorities. Even though, quotas are strictly forbidden, an adverse impact on women and minorities has to be avoided. This adverse impact is automatically suggested by Federal agencies, if the selection rate for any race, sex, or ethnic group is less than 80 percent of the rate for the group with the highest selection rate. In such an event, affirmative action has to be applied to resolve the adverse impact. It could be argued, that

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<sup>566</sup> Ibid § 60-3.17(4).

such a procedure contains a kind of ‘negative’ limit for affirmative action, because it is only applied if a certain percentage is undercut resulting into an imbalance in regards to gender and race in the workplace.

In *Johnson v Transportation Agency*, the Supreme Court held that the maintenance of a balanced workforce regarding sex and race was an obstacle to affirmative action, as affirmative action is supposed to be a temporary measure by the Supreme Court. Further temporary limitations in *Title 41 CFR* are included only for certain administration and enforcement procedures, but not to end affirmative action programs.<sup>567</sup> Despite lacking a defined end point, the affirmative action programs must be updated annually, which adds a temporal element to their operation.<sup>568</sup>

Affirmative action programs for government construction contractors include timetables that have to be published in the Federal Register. Goals have to be set annually. In contrast to the goals of non-construction contractors, these goals must be defined for minorities and women separately. Moreover, the goals of construction contractors have to be established in percentage terms in each trade on all construction work in the geographical area of the construction project. Although there are no regulated end points for the affirmative action programs, the nature of a construction projects such that it has a defined end point in itself. In this case, the duration of the application of an affirmative action program could be seen as directly related to the length and nature of the contract. However, there is still a broader issue of when affirmative action programs in federal contracting should cease entirely. There is nothing in *Title 41* to address this issue.<sup>569</sup>

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<sup>567</sup> 41 CFR § 60-20.1.

<sup>568</sup> This issue is further elaborated in Chapter 7 of this thesis.

<sup>569</sup> 41 CFR § 60-20.1.

## VI. CONCLUSION ABOUT LIMITS FOR AFFIRMATIVE ACTION IN THE UNITED STATES

Affirmative action in the United States is still able to trigger heated debates about its constitutionality and the necessity of its use in 2012. One of the reasons for this situation might be that these measures themselves do not always include sufficiently explicit limits, either in the form of a future end point for all affirmative action programs or a well articulated system for monitoring affirmative action measures. This lack of an overall end point for the general usage of affirmative action and the often vague language used to express interim limits for these policies leaves them open to the charge of reverse discrimination despite the fact that they are in fact intended to be temporary measures.

The idea of limiting affirmative action by applying express limits has also been supported by the Supreme Court of the United States through the application of the Strict Scrutiny Test. The case studies of *Johnson v Transportation Agency*<sup>570</sup> and *Adarand Constructors, Inc. v Peña*<sup>571</sup> revealed that the Supreme Court has no consistent method of determining the limits of affirmative action.

Furthermore, none of the US affirmative action measures discussed have specific targets or temporal limits. However, regulations and guidance rules of federal agencies implementing and monitoring affirmative action programs such as *Title 29 CFR* and *Title 41 CFR* do include goals and timetables. These regulations include specific long-term and interim goals and timetables for voluntary affirmative action programs and incorporate assessment tools for the application of monitoring systems for these policies.

Given that affirmative action policies are not popular judging by the success of state ballots repealing them, there is a strong case to me made for better defining and articulating legal limits for affirmative action policies in the United States. As well as increasing their justification as affirmative action measures, it may increase their general acceptance, would assist the U.S. Supreme Court in its

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<sup>570</sup> 480 US 616 (1987).

<sup>571</sup> 515 US 200 (1995).

application of the Strict Scrutiny Test, and importantly would mean the policies are better directed to complying with the US's obligations under *CERD* and *CEDAW*. Chapter 7 investigates further what are the most effective means of establishing limits for affirmative action. Overall, the United States is not obliged to comply with *CEDAW*. However, as the investigation conducted in this chapter has revealed, it is not in compliance with *CERD* in the area of the implementation of affirmative action in many states.

## **CHAPTER FIVE**

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### **THE LIMITS OF AFFIRMATIVE ACTION IN CANADA**

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## I. INTRODUCTION

Employment equity [affirmative action]... requires a special blend of what is necessary, what is fair and what is workable. To ensure freedom from discrimination requires government intervention through law. It is not a question of whether we need regulation in this area, but of where and how to apply it ... Law in a democracy is the collective expression of the public will. We are a society ruled by law – it is our most positive mechanism for protecting and maintaining what we value. Few matters deserve the attention of the law more than [employment equity] ... It is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear in time. Equality in employment will not happen unless we make it happen.

Judge Rosalie  
Silberman  
Abella<sup>572</sup>

These words of Judge Abella are part of a Royal Commission Report of the Commission on Equality in Employment in 1984, the ‘Abella Report’, which was undertaken to ‘inquire into the most efficient, effective, and equitable means of promoting employment opportunities for and eliminating systemic discrimination against four designated groups: women, native people, disabled persons, and visible minorities’.<sup>573</sup> This report was based on the ‘examination of employment practices of 11 designated crown and government-owned corporations representing a broad range of Canadian enterprise’, which were used as ‘illustrative models of the issues under study’.<sup>574</sup> In order to assess employment discrimination on a broader scale, the Abella Report analysed the ‘multi-dimensional nature of the barriers facing the four designated groups’, which included the perspective that ‘any given corporation reflects the social, economic, and political environment in which the corporation functions’.<sup>575</sup>

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<sup>572</sup> Rosalie Silberman Abella, Commission on Equality in Employment, *Equality in Employment: A Royal Commission Report* (1984) 7.

<sup>573</sup> *Ibid* 5.

<sup>574</sup> *Ibid*. These chosen corporations included ‘Petro-Canada, Air Canada, Canadian National Railway Company, Canada Mortgage and Housing Corporation, Canada Post Corporation, Canadian Broadcasting Corporation, Atomic Energy of Canada Limited, Export Development Corporation, Teleglobe of Canada Limited, The de Havilland Aircraft of Canada Limited, and the Federal Business Development Bank’: at 5.

<sup>575</sup> *Ibid*.

In this context, the Abella Report scrutinised not only the employment practices of the companies involved, but also the ‘realities in the wider community’, which includes what Canadians in general ‘do, believe or expect’ in regards to employment matters.<sup>576</sup> Therefore, the Abella Report focused on the societal as well as ‘on the corporate reflection of the problem’ of employment discrimination.<sup>577</sup> In the end, after a thorough investigation, the Abella Report concluded that ‘without legislation and a reporting requirement, substantial change [in employment discrimination] was unlikely’.<sup>578</sup>

The result of the Abella Report indicated that ‘existing anti-discrimination legislation and voluntary affirmative action measures had not proved sufficient in themselves to remove historical barriers to employment’ for historically disadvantaged groups like ‘women, aboriginal peoples, visible minorities, and persons with disabilities’.<sup>579</sup> Therefore, new legislation was enacted to address the problem of racial and gender discrimination at the workplace - the *Employment Equity Act 1986*, which made affirmative action (employment equity) measures a mandatory matter to government-related employment in Canada.<sup>580</sup> The goal of the Act is ‘to identify and eliminate discriminatory employment practices’, especially with respect to certain social groups like women and visible minorities.<sup>581</sup>

The *Employment Equity Act 1986* represented a compromise between proponents of ‘voluntary affirmative action programs’ who firmly believed that voluntary measures would ‘achieve the desired results over time’, and the proponents of ‘forceful government intervention’ who supported the implementation of mandatory affirmative action and harsh penalties for the non-compliance of employers involved.<sup>582</sup> In the end, these disparities led to the implementation of an Act that lacked enforceability and strict ‘employer obligations to demonstrate

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<sup>576</sup> Ibid.

<sup>577</sup> Ibid.

<sup>578</sup> Ibid.

<sup>579</sup> John Hucker, ‘Towards Equal Opportunity in Canada: New Approaches, Mixed Results’ (1995) 26 *Saint Mary’s Law Journal* 849.

<sup>580</sup> Ibid.

<sup>581</sup> Michelle Falardeau-Ramsay, ‘Human Rights Legislation: The Path Ahead’ (1998) 47 *University of New Brunswick Law Journal* 170.

<sup>582</sup> Hucker, above n 579, 850.

that employment equity [affirmative action] ha[d] been implemented in the workplace'.<sup>583</sup> Having acknowledged these shortcomings, the *Employment Equity Act of 1995 (EEA 1995)* was adopted, giving the Canadian Human Rights Commission more enforcement powers against employers who are not in compliance with the Act.<sup>584</sup>

These legal developments were also part of the fulfilment of Canada's obligations under *CERD* and *CEDAW*.<sup>585</sup> Canada, as well as the United States, is a society based on liberal democratic values which accommodates diverse multicultural backgrounds including differing religions, cultures and lifestyles.<sup>586</sup> The population growth in Canada is mostly based on immigration, which led to a 46 per cent increase in population from 2001 to 2006.<sup>587</sup> Altogether, well over 200 different ethnic groups live in Canada and it is estimated by government officials that these groups 'will account for 20 percent of the population by 2016'.<sup>588</sup> The majority of immigrants to Canada are from 'South Asia, China, the Caribbean, Africa, and Latin America'.<sup>589</sup>

In 2003, *CERD* officials conducted an investigation about racial discrimination in Canada, which revealed that even though Canada is one of the 'very few countries that celebrate and encourage diversity' and has shown its commitment to 'human rights standards and the mechanisms needed to uphold and implement them', some problems remain largely unsolved, for example, the over-representation of ethnic minorities, especially of African descent, in the criminal justice system, low-income housing, racial profiling, and a dependency on welfare payments due to a very high unemployment rate amongst aboriginals and

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<sup>583</sup> Falardeau-Ramsay, above n 581, 170.

<sup>584</sup> Ibid.

<sup>585</sup> Canada ratified *CERD* on 14 October 1970 (after having signed it on 24 August 1966), and ratified *CEDAW* on 10 December 1981 (after having signed it on 17 July 1980).

<sup>586</sup> Canada is a constitutional monarchy as well as a representative democracy with a parliamentary system.

<sup>587</sup> Paula DeCoito, Social Planning Council of Peel, *Social Exclusion of Minority Groups: A Conceptual Framework* (Canadian Heritage, Multiculturalism and Aboriginal Programs, 2008) 5.

<sup>588</sup> Government of Canada, Department of Canadian Heritage, *A Canada for All: Canada's Action Plan Against Racism* (2005) 2.

<sup>589</sup> DeCoito, above n 587, 5. The term 'traditional' as opposed to the term 'non-traditional' immigrants, describes white persons, mostly of English or European descent: at 5.

visible minorities.<sup>590</sup> *CERD* officials further revealed that minority groups are overrepresented in occupations with low income, and are often subject to racially motivated harassment at the workplace.<sup>591</sup>

In 2007, another United Nations report of *CERD* officials revealed concerns about the lack of information available regarding the ‘overall assessment of the socio-economic conditions of various ethnic and racial groups in the population, including African-Canadians, particularly in the fields of employment and education’.<sup>592</sup> Moreover, the report referred to employment issues more explicitly by pointing out that ‘in particular, African Canadians and Aboriginal people continue to face discrimination in recruitment, remuneration, access to benefits, job security, qualification recognition in the workplace, and are significantly under-represented in public offices and government positions’.<sup>593</sup> In this context, *CERD* officials recommended that the Canadian government ‘strengthen or adopt, as necessary, specific programmes to ensure appropriate representation of ethnic communities in government and public administration, at federal and provincial/territorial levels’.<sup>594</sup>

*CEDAW* officials reported in 2008 that for the most part, women in Canada occupy low-paid or part-time jobs, whilst they are underrepresented at full-time workplaces and high-income jobs, and face ‘a continuing employment rate gap between men and women’.<sup>595</sup> This employment situation affects all Canadian women, but especially aboriginal women and women of ethnic minorities, who are the most vulnerable group regarding equality issues. In light of these facts, the *CEDAW* officials recommended the implementation of temporary special

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<sup>590</sup> United Nations, Economic and Social Council, Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia And All Forms Of Discrimination – Report by Mr Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance – Mission to Canada* (2004) 8, 14, 16, 21.

<sup>591</sup> Ibid 16.

<sup>592</sup> United Nations, Committee on the Elimination of Racial Discrimination, *CERD, Consideration of Reports Submitted by State Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination CANADA* (2007) 2.

<sup>593</sup> Ibid 7.

<sup>594</sup> Ibid.

<sup>595</sup> United Nations, Convention on the Elimination of All Forms of Discrimination against Women (*CEDAW*), Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee of the Committee on the Elimination of Discrimination against Women – CANADA* (2008) 8-9.

measures to better the situation for women in Canada.<sup>596</sup> This perception of the United Nations about the situation of women in Canada is accepted by many Canadians who acknowledge a ‘need to address discriminatory practices’.<sup>597</sup> However, this acknowledgment also encounters some opposition, particularly with respect to what kind of measures should be applied to alleviate discrimination and how far such measures should extend.<sup>598</sup>

In the light of this steadily increasing diversity, Canada has emphasised its support of multiculturalism, non-discrimination and equal opportunities for racial minorities and women by implementing a comprehensive legal framework regarding ‘equality and non-discrimination at the federal and provincial and territorial levels’.<sup>599</sup> Affirmative action (employment equity) was firstly established through the enactment of the *Canadian Human Rights Act* in 1976, which aimed at the ban of ‘discriminatory practices’ and ‘prejudicial employment policies and practices’.<sup>600</sup> In order to strengthen Canada’s efforts of achieving employment equity, the *Employment Equity Act 1986* was established. The Act focuses on the employment needs of visible minorities.<sup>601</sup>

In 1995, new enforcement powers were added to the Act in order to strengthen it. Canada’s employment equity measures not only represent positive actions to remedy past discrimination, but also attempt to prevent present and future discrimination of the designated groups of the *EEA 1995* – Aboriginal peoples, disabled persons, visible minorities and women – by eliminating employment barriers.<sup>602</sup>

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<sup>596</sup> Ibid 9. Canada is expected to report on the mentioned issues to the United Nations (CEDAW) in 2014: at 11.

<sup>597</sup> Hucker, above n 553, 846.

<sup>598</sup> Ibid.

<sup>599</sup> United Nations General Assembly Human Rights Council, *Report of the Independent Expert on Minority Issues – Mission to Canada* (2010) 1.

<sup>600</sup> Chulguen Yang et al, ‘A Cross-National Analysis of Affirmative Action: An Evolutionary Psychological Perspective’ (2006) 27 *Managerial and Decision Economics* 209.

<sup>601</sup> *Canadian Human Rights Act 1976-1977*, c33, s2. Ibid.

<sup>602</sup> *Employment Equity Act 1995*, s3; the term ‘visible minorities’ is also defined in section 3 of the Act and includes ‘persons, other than aboriginal peoples, who are non-Caucasian in race or non-White in colour’. The term ‘employment barriers’ for designated groups outlines ‘employment practices, policies or systems that have an adverse impact on members of designated groups and that are not bona fide occupational requirement’. Labour Canada - Human Resources and Skills Development Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 3-4.

Despite of Canada's efforts to eliminate discrimination, it has been established through public opinion surveys that racial discriminatory behaviour is still alive and well throughout Canadian society.<sup>603</sup> Discrimination leads to social exclusion of ethnic minority groups 'that Canada needs to grow its population and economy', and results into 'being "excluded" from equal access to resources and opportunities' for the social groups involved.<sup>604</sup>

In response to these issues, Canada launched an initiative called 'A Canada for All: Canada's Action Plan against Racism' in March 2005, which is based on the already existing anti-discrimination laws and aims at the elimination of racial discrimination in Canada.<sup>605</sup> This plan focuses on the fight against racism in order to further formal equality by providing equal opportunities, and aims at furthering the enhancement of substantive equality in order to establish a better social cohesion.<sup>606</sup> The Canadian government regards this approach as strengthening 'Canada's social foundations' as well as its economy, which is believed to benefit the diversity of its citizens by adding new 'talents, perspectives and experiences' to society.<sup>607</sup>

Further initiatives were instigated in combination with Canada's Action Plan against Racism, including the Canadian Race Relations Foundation, which aims at eradicating racism in education and employment matters, the Multiculturalism Program, and the Women's Programs of the Department of Canadian Heritage, which aim to alleviate effects of racism and improve the economic status of

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<sup>603</sup> Government of Canada, Department of Canadian Heritage, *A Canada for All: Canada's Action Plan Against Racism* (2005) 3. The report further states that 'A 2003 Ipsos-Reid survey, commissioned by the Centre for Research and Information on Canada and the Globe and Mail, reports that 74 percent of Canadians polled believe that racism is prevalent in Canada. Analysis of Statistics Canada's 2002 Ethnic Diversity Survey reveals disturbing levels of reported discrimination and unfair treatment experienced by visible minorities, and particularly by Blacks, in the last five years': at 3; Furthermore, a survey of 'Canadian Attitudes Toward Immigrant Ethnic Communities' by Leger Marketing in 2007 stated that '47 per cent of respondents confessed to some racist views and that their prejudice is "planted firmly at the door of Arab and Muslim minorities"'. African Canadian representatives stated that anti-black racism must be understood in the context of a history rooted in the maintenance and perpetuation of stereotypes of African-Canadians as inferior, overly aggressive and prone to criminality'. United Nations General Assembly Human Rights Council, above n 599, 8.

<sup>604</sup> DeCoito, above n 587, 6.

<sup>605</sup> Government of Canada, Department of Canadian Heritage, above n 603, ii, 3.

<sup>606</sup> Ibid 10.

<sup>607</sup> Ibid.

women in Canada.<sup>608</sup> In order to achieve the desired substantive equality, the Canadian government collects data associated with its policies and practices to find the best ways to achieve equality outcomes.<sup>609</sup>

Government officials in Ottawa claim that discrimination is one of the most common factors that raises barriers for ‘Aboriginal residents, immigrants, recent immigrants, visible minority residents and people with disabilities ... which others do not encounter and which contribute to higher rates of poverty and unemployment’.<sup>610</sup> In this context, the Honourable Jean Augustine pointed out that ‘[i]t is a fact that most Canadians would deny the existence of widespread racism – particularly anti-Black racism as it occurred in the United States - but the facts of Canadian history, legal and non-legal, do not support such denials’.<sup>611</sup>

Nevertheless, Canada has gained a reputation for being a world leader in fighting racial discrimination, which is due to Canada’s efforts in eradicating discrimination on the federal level, and on its provincial levels, where policies and programmes against discrimination have also been launched, as well as its investment of ‘considerable resources into meeting expectations of its Constitution and legislation’ regarding discrimination issues.<sup>612</sup>

Like the United States, Canada is a country that has chosen to use affirmative action in order to remedy past discrimination and alleviate the negative lingering effects of past and present discrimination for affected groups. Unlike the *United States Constitution*, the *Canadian Constitution* explicitly allows for the

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<sup>608</sup> Ibid 34.

<sup>609</sup> Ibid 11.

<sup>610</sup> Social Planning Council of Ottawa, *Poverty Profile of the City of Ottawa - Based on the 2006 Census* (2010) 5, 7. The term ‘poverty’ described by the report is based on the so-called ‘Low-Income-Cut-Off’ (LICO), which addresses people who ‘spend 55% of their income (20% more than average) on food, shelter and clothing’: at 10.

<sup>611</sup> The Honourable Jean Augustine (P.C., M.P.), ‘The Impact of Section 15 on Equality Seeking Groups: Discrimination Based on Race, Origin or Colour’ (2005) 19 *National Journal of Constitutional Law* 386.

<sup>612</sup> Government of Canada, Department of Canadian Heritage, above n 603, 36; United Nations General Assembly Human Rights Council, above n 18, 8, 19. For example, ‘in 2008, Quebec adopted the policy “Diversity: An Added Value”, [which] primarily focused on combating racism and racial discrimination’ in several areas, especially in employment matters and education: at 8-9.

application of affirmative action. Section 15(1) of the *Charter of Rights and Freedoms* emphasises ‘the equal protection and equal benefit of the law without discrimination’ for all Canadians. The Charter specifically states in s 15 (2) that equal protection ‘does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups’.<sup>613</sup> This is the basis for the application of affirmative action in Canada.<sup>614</sup>

Another important difference between affirmative action used in the United States, and affirmative action used in Canada, lies in the fact that Canadians chose to rename their pro-active equality policies in relation to employment as ‘employment equity’. This was done to avoid the growing public negative image that has been associated with affirmative action in the United States.<sup>615</sup> In this context, affirmative action is regarded by parts of the public as ‘interventionist government policies’ that are detrimental for business.<sup>616</sup> By rephrasing the term ‘affirmative action’, the Canadian government hoped to create a positive image of programs aimed at addressing systemic discrimination in employment.<sup>617</sup>

Canadians have attempted to learn from the American experience with affirmative action in order to improve their own affirmative action. The first important step of this learning experience was to recognise the essential need for mandatory and legislated measures in order to ensure their successful application.<sup>618</sup> In the American experience, the constitutionality of affirmative action – and therefore its legitimacy - has been regarded as controversial since its first introduction, because these policies are not explicitly mentioned in the *United States Constitution*. Therefore, the Canadians chose to give these policies a constitutional foundation in their legal system, which ensures that opponents of these policies cannot easily challenge their legality. The explicit legality of affirmative action in Canada simplifies the handling of these policies in court

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<sup>613</sup> *The Canadian Charter of Rights and Freedoms*, s 15 (2).

<sup>614</sup> *The Canadian Charter of Rights and Freedoms*, s15.

<sup>615</sup> Gunderson, Morley Douglas Hyatt and Sara Slinn, ‘Employment Equity in Canada and the United States’ in Paula B Voos (ed), *Industrial Relations Research Association Series - Proceedings of the 54<sup>th</sup> Annual Meeting - Atlanta* (January 2002) 146; Abella, above n 572, 6.

<sup>616</sup> Abella, above n 572, 6.

<sup>617</sup> *Ibid.*

<sup>618</sup> *Ibid.*



cases. As a result, unlike the US, there is no body of case law relating to the validity of affirmative action in Canada.

The Canadian Human Rights Commission (CHRC) deals with most challenges to affirmative action and the Canadian Human Rights Tribunal hears appeals from the decision of the Commission.<sup>619</sup> The CHRC is able to settle discrimination allegations against employers by offering holistic mediating processes, and giving orders of correctional measures to the companies involved.<sup>620</sup> In the event that such mediating processes fail, or the discrimination charges are serious, they are heard by the Canadian Human Rights Tribunal.<sup>621</sup> Appeals from decisions of the Tribunal can be made to the Federal Court, which can review the case, but cannot change the Tribunal's decision.<sup>622</sup>

The CHRC is not only responsible for the administration of the *Canadian Human Rights Act 1977*, but also for the *EEA 1995*, which is Canada's specific federal affirmative action legislation in regards to employment matters.<sup>623</sup> Whilst both acts cover around '12 per cent of Canada's labour market, totalling about 1,527 employers and 1.94 million employees', including all 'federally regulated employers and industries'. Federally regulated employers include banks, telecommunication companies, and transportation companies like airlines. The rest of Canada's employers and employees, which include the majority of private workforce, come within the jurisdiction of provincial governments, which apply their own human rights laws.<sup>624</sup>

This chapter analyses whether or not Canada's affirmative action legislation includes temporary limits for its application, whether these limits are required, and how they are enforced in Canada. The chapter examines Canada's most important legislation in regards to affirmative action (employment equity), namely the *Charter of Rights and Freedoms of the Constitution Act 1982*, the

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<sup>619</sup> *Canadian Human Rights Act 1985* s 48.1, United Nations General Assembly Human Rights Council, above n 599, 6.

<sup>620</sup> *Canadian Human Rights Act 1985* s 27.

<sup>621</sup> *Ibid* ss 49, 50.

<sup>622</sup> *Ibid* s 58.

<sup>623</sup> United Nations General Assembly Human Rights Council, above n 599, 6.

<sup>624</sup> *Ibid* 6, 11.

*Canadian Human Rights Act 1977*, and the *EEA 1995*. Finally, the chapter investigates the only two federal mandatory employment equity programs in Canada; the Legislated Employment Equity Program (LEEP) and the Federal Contractors Program (FCP).

Generally, affirmative action is more accepted in Canada than in the United States. To some extent this can be attributed to the more supportive legal framework for the implementation of affirmative action policies as is described below.

## II. SUPPORTIVE CONSTITUTIONAL APPROACH

Canada, unlike most countries, has not a single document as its constitution, but ‘much of Canada’s constitutional law continues to be found in a variety of written and unwritten sources’.<sup>625</sup> One of the main sources of constitutional law in Canada is the *Constitution Act 1982*, which contains the *Canadian Charter of Rights and Freedoms* in Part One of the Act (sections 1 to 34).<sup>626</sup> The *Charter* sets out Canada’s fundamental principles. Section 15 (1) establishes the principle of equality:

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

Section 15 (2) permits affirmative action programs as a means of redressing disadvantage experienced on a range of grounds:

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

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<sup>625</sup> Yves de Montigny, ‘Canadian Federalism’ in European Commission for Democracy through Law (ed), *The Resolution of Conflicts between the Central State and Entities with Legislative Power by the Constitutional Court – Science and Technique of Democracy No. 35* (Council of Europe, 2003) 73.

<sup>626</sup> *Ibid.*

Section 15(2) is not welcomed by all Canadians. One member of the Canadian Parliament stated in relation to s 15(2) that it is a ‘part of the *Charter* that [Canadians] could do without’. He went on to say that ‘the rights of those who are affected by such programs are simply forfeited in the interest of achieving the aims of the program’, which is in his opinion nothing else than reverse discrimination.<sup>627</sup>

Section 28 of the Charter is a further equality provision. It states that:

‘Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.’

Together, sections 15 and 28 demonstrate Canada’s commitment to equality and the understanding that affirmative action policies are necessary to achieve substantive equality in Canada.

Section 1 of the Charter provides a general limitation on measures that affect Charter rights and is particularly relevant to affirmative action measures:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This general limitation clause allows reasonable limits to rights of the Charter, which means that the rights of the Charter are not absolute.<sup>628</sup> Section 1 refers only to ‘law’ and as a result excludes policies and government programs.<sup>629</sup>

In order to assess whether a law under section 1 of the Charter is appropriate, the Canadian Supreme Court has firstly to determine whether the challenged law ‘has the effect of limiting one of the guaranteed rights’ of the Charter, and if this is affirmed, the Court must determine whether the limit ‘is a reasonable one that

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<sup>627</sup> Parliament of Canada, Parliamentary Debate No 43, *Statement of Mr Scott re Affirmative Action* (March 23, 1994) 2703 (1845).

<sup>628</sup> Jonathan L Black-Branch, ‘Entrenching Human Rights Legislation under Constitutional Law: the Canadian Charter of Rights and Freedoms’ (1998) 3 *European Human Rights Law Review* 325.

<sup>629</sup> *Ibid* 326.

can be demonstrably justified in a free and democratic society'.<sup>630</sup> The latter is determined by the so-called 'Oakes-Test' that is named after the case in which it was developed in 1986.<sup>631</sup>

In accordance to the Oakes-Test, a law can only be regarded as 'a reasonable limit on Charter rights if it satisfies a proportionality test'.<sup>632</sup> This proportionality test requires that a 'law must pursue an important objective, be rationally connected with that objective, impair Charter rights no more than necessary to accomplish the objective, and not have a disproportionately severe effect on the persons to whom it applies'.<sup>633</sup>

Section 1 applies to all other sections of the Charter, and could therefore also be applied to section 15 (2) which includes the allowance of affirmative action. So far, the Court has only addressed section 1 in relation to equality rights of the Charter in *Andrews*,<sup>634</sup> in which it determined whether the law required barristers and solicitors to be Canadian citizens could be justified under section 1 of the Charter. *Andrews* addressed section 15(1) of the Charter, but not 15(2). To date, the general limitation clause of section 1 has not been used to limit the application of affirmative action.

Unlike in the United States, where the *Equal Protection Clause* in the *United States Constitution*, the *Canadian Charter of Rights and Freedoms* clearly supports the application of affirmative action. The difference in the constitutional frameworks of the two countries affects the way affirmative action jurisprudence has developed in each jurisdiction.

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<sup>630</sup> Joan Church et al, *Human Rights from a Comparative and International Law Perspective* (University of South Africa Press, 2007) 90.

<sup>631</sup> *R v Oakes* [1986] 1 SCR 103. The Oakes Test has been slightly modified over time, but remains in its entirety valid as explained above. Modifications include e.g. determinations by the Supreme Court about whether or not it can be applied in certain cases. See *Dore v Barreau du Quebec* [2012] 1 SCR 395, in which it was determined that the Oakes Test cannot be applied in regards to administrative law decisions. Moreover, modifications have been made in regards to the demand for definitive proof in each stage of the Oakes Test. See also Sujit Choudhry, 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 *Supreme Court Law Review* 2d, 501-25.

<sup>632</sup> Christine Bateup, 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights' (2009) 32 *Hastings International and Comparative Law Review* 541; *R v Oakes* [1986] 1 SCR 103, 138-9.

<sup>633</sup> *Ibid.* *R v Oakes* [1986] 1 SCR 103, 138-9.

<sup>634</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; the Court decided that section 1 of the Charter could not justify the requirement of Canadian citizenship included in a law for barristers and solicitors.

### **A. Supreme Court Cases and Limits for Affirmative Action**

The Canadian Supreme Court has only dealt with a few challenges to affirmative action measures due to the fact that the *Charter of Rights and Freedoms* directly allows for the implementation of affirmative action. Unlike in the United States Supreme Court, the Canadian Supreme Court has not made any statements about the requirement for temporal limits in employment equity. The investigation of limits therefore occurs mainly at the level of government law and policy. Before moving to Canadian law and policy, it is important to frame the analysis with a consideration of the Supreme Court's most extensive appraisal of legislation applying special measures, *Canadian National Railway v Canada*<sup>635</sup>

#### **1. Canadian National Railway v Canada**<sup>636</sup>

*Canadian National Railway v Canada* deals with the issue of sexual discrimination in the workplace that resulted in systemic barriers for women at Canadian National Railway.<sup>637</sup> A feminist group called Action Travail des Femmes claimed that Canadian National Railway had discriminated against women on the basis of gender in regards to 'hiring and promotion practices contrary to section 10 of the *Canadian Human Rights Act* by denying employment opportunities to women in certain unskilled blue-collar positions'.<sup>638</sup> The Canadian Human Rights Tribunal upheld the claim and concluded that 'it was essential to impose upon the CN [Canadian National Railway] a special employment program'.<sup>639</sup> This program included a special temporary order that aimed to increase the representation of women at CN to 13 percent, which represents the national average of 'the proportion of women working in non-traditional occupations' in Canada.<sup>640</sup> The Tribunal's order also

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<sup>635</sup> The case *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 is also cited and indexed as *Action Travail des Femmes v Canadian National Railway*.

<sup>636</sup> [1987] 1 SCR 1114.

<sup>637</sup> Rosanna Langer, 'Five Years of Canadian Feminist Advocacy: Is It Still Possible to Make a Difference?' (University of Windsor, 2005) 23 *Windsor Yearbook of Access to Justice*, fn 2.

<sup>638</sup> *Canadian National Railway v Action Travail des Femmes* [1985] 1 FC 96; *Canadian National Railway* [1987] 1 SCR 1115.

<sup>639</sup> *Canadian National Railway* [1987] 1 SCR 1115.

<sup>640</sup> *Ibid.*

stated that ‘until that goal was achieved, [CN would have] to hire at least one woman for every four non-traditional jobs filled in the future’.<sup>641</sup>

Canadian National Railway appealed to the Federal Court of Appeal, which decided that the Tribunal had no authority to make an order that would ‘remedy the consequences of past discrimination’.<sup>642</sup> This statement was based on the fact that the *Canadian Human Rights Act 1977* has as its purpose not the punishment of past wrongdoings, but the prevention of future discrimination.<sup>643</sup> In a new appeal, the Supreme Court had to decide whether or not the Tribunal had the power to ‘impose upon an employer an “employment equity program” to address the problem of past “systemic discrimination” in the hiring and promotion of a disadvantaged group’.<sup>644</sup>

The Supreme Court concluded after a review of the case that employment equity programs had been designed to ‘break a continuing cycle of systemic discrimination’ - not with the goal of providing a remedy or compensation for past discrimination, but to ‘ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears’.<sup>645</sup> The Supreme Court further elaborated that in regards to employment equity programs ‘there simply cannot be a radical dissociation of “remedy” and “prevention” for there is no prevention without some form of remedy’.<sup>646</sup> The Supreme Court held that ‘it is essential, in attempting to combat systemic discrimination, to look to the past patterns of discrimination and to destroy those patterns’.<sup>647</sup> The goal of destroying patterns of systemic discrimination can be interpreted as implying temporal limits for the use of employment equity programs because once those patterns are destroyed, they will no longer be necessary. Accordingly, the Supreme Court concluded that the Tribunal’s special temporary order regarding hiring goals of women to the

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<sup>641</sup> Ibid.

<sup>642</sup> . *Canadian National Railway v Action Travail des Femmes* [1985] 1 FC 96.

<sup>643</sup> *Canadian National Railway* [1987] 1 SCR 1115.

<sup>644</sup> Ibid.

<sup>645</sup> Ibid 1116.

<sup>646</sup> Ibid.

<sup>647</sup> Ibid.

Canadian National Railway was in line with the *Canadian Human Rights Act 1977* and well within the Tribunal's powers.<sup>648</sup>

The decision of the Supreme Court in this case made clear that the application of employment equity measures, which are designed to prevent future discrimination from occurring again, can also take into consideration past discrimination in order to understand the patterns of discrimination for future prevention. In this way, the Supreme Court allowed for a generous application of employment equity measures without having to limit its implementation to explicit reasons for past, present or future discrimination as long as its application aims at the prevention of present or future discrimination against the designated groups defined in the *EEA 1995*. The designated groups include aboriginal peoples, disabled persons, visible minorities and women.

The Canadian Supreme Court is clearly supportive of employment equity (affirmative action) measures, which are used to prevent present and future discrimination of designated groups. Unlike the Supreme Court of the United States, the Canadian Supreme Court's way of applying employment equity focuses on the constructive resolution of racial and gender discrimination without dwelling on the assignment of guilt to potential employers at fault in order to justify the implementation of employment equity. Therefore, the Canadian Supreme Court does not try to limit the use of employment equity to specific past wrongdoings, but assesses present employment situations by taking the past and present behaviour patterns in hiring and promotion into account to determine whether or not systemic discrimination has occurred, which can justify the Court's order to apply employment equity at the workplace involved.

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<sup>648</sup> Ibid.

### III. ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION

#### A. *Canadian Human Rights Act 1977*

One of Canada's most important anti-discrimination laws regarding race and gender is the *Canadian Human Rights Act*, which was passed in 1977 by the federal government.<sup>649</sup> The *CHRA 1977*<sup>650</sup> is applied to 'federally regulated employers and service providers' to eliminate discrimination as well as harassment at the workplace, which includes the treatment of customers 'when requesting a service'.<sup>651</sup> The purpose of the *CHRA 1977* is stated in section 2, which focuses on 'the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have' regardless of their 'race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which pardon has been granted'.<sup>652</sup> The *CHRA 1977* contains a general prohibition of discrimination in section 3,<sup>653</sup> which is followed by a list of several discriminatory practices in sections 5 to 14.1.<sup>654</sup> Discriminatory behaviour on the grounds mentioned above includes 'not being hired, losing a job, being paid less, not getting a promotion or some other work benefit' as well as any form of unfair treatment, for example being denied a 'service that is generally available to the public' or 'requiring job applicants to have Canadian experience'.<sup>655</sup> Moreover, such discriminatory behaviour also includes harassment, which can be defined as 'behaviour that demeans, humiliates or embarrasses a person if a reasonable person should have known it was unwelcome'.<sup>656</sup> Harassment on the grounds mentioned above also include 'actions (e.g. touching, pushing), comments (e.g. jokes, insults, name-calling) or

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<sup>649</sup> John A Roberts et al, *Diversity and First Nations Issues in Canada* (Emond Montgomery Publications, 2008) 47.

<sup>650</sup> *CHRA 1977* is used as an abbreviation for the *Canadian Human Rights Act*, SC 1977, c H-6.

<sup>651</sup> *CHRA 1977*, s 5, see also Canadian Human Rights Commission, *Race, Colour, National and Ethnic Origin Anti-Discrimination Casebook* (2001) 1.

<sup>652</sup> *CHRA 1977*, s 2.

<sup>653</sup> *Ibid* s 3.

<sup>654</sup> This list of discriminatory practices from section 5 to section 14.1 of the CHRA ranges from denial of goods and services (section 5) over employment (section 7 to 11) to hate messages (section 13), harassment (section 14) and retaliation (section 14.1).

<sup>655</sup> Canadian Human Rights Commission, *A Guide to the Canadian Human Rights Act* (2009) 2.

<sup>656</sup> *Ibid*.



displays (e.g. posters, cartoons)', which can be prosecuted if they are directed against a person or a certain social group.<sup>657</sup>

In addition, the *CHRA 1977* allows the application of special measures in employment matters. These special measures (affirmative action)<sup>658</sup> are firstly mentioned in subsection 16 (1), which outlines the allowance of 'special programs' by stating that:

It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

These special programs range from something as simple as 'a training program for workers from a disadvantaged group' to 'a comprehensive employment equity plan' designed for the employer involved.<sup>659</sup> Special measures can also be defined as 'temporary measures, targeted at a specific designated group in a particular occupation (such as targeted recruitment or special training initiatives aimed primarily at correcting employment imbalances stemming from past discrimination, over a specific period of time)' with the overall goal of expediting the 'recruitment, selection and promotion of qualified designated group members to achieve full representation'.<sup>660</sup> The specifics of the implementation of special measures under the *CHRA 1977* are discussed under part V in this chapter. The *CHRA 1977* defines designated groups in section 40.1(1) in reference to the *EEA 1995* as aboriginal peoples, disabled persons, visible minorities and women, whose full representation in employment is achieved if 'the percentage of designated group employees in an occupational group' is equivalent or more than 'their percentage availability in the labour market'.<sup>661</sup> The designated group of visible minorities refers to 'persons other

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<sup>657</sup> Ibid.

<sup>658</sup> Jane Hodges-Aeberhard et al, *Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities* (International Labour Office Geneva, 1997) 8.

<sup>659</sup> Canadian Human Rights Commission, *A Guide to the Canadian Human Rights Act* (2009) 3.

<sup>660</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 11.

<sup>661</sup> Ibid 12.

than aboriginal peoples, who are non-Caucasian in race or non-White in colour'.<sup>662</sup>

Complaints about violations of the *CHRA 1977* are investigated by the Canadian Human Rights Commission, which also develops policies against discrimination, for example, on harassment in the workplace.<sup>663</sup> Furthermore, the *CHRA 1977* outlines in subsection 16 (2) the possibility of receiving advice and assistance by the Canadian Human Rights Commission for persons who want to implement these 'special programs, plans or arrangements'.<sup>664</sup> The Canadian Human Rights Commission not only supports persons with the implementation of special measures, but is also empowered to impose special measures in the event that an employer was found to use a discriminatory practice.<sup>665</sup>

The Canadian Human Rights Commission operates separately from the Canadian Human Rights Tribunal, which can be summoned by the CHRC in order to conduct further examination of complaints about employment discrimination.<sup>666</sup> The Canadian Human Rights Tribunal conducts its adjudicative function by holding public hearings, which can result in the order of a remedy to resolve the employment discrimination of the employer involved.<sup>667</sup> Whilst the complaint process administered by the Commission 'is not public', the Tribunal 'is like a court' and therefore the complaint and relevant information regarding it becomes public.<sup>668</sup> If the claimant is not satisfied with the decision of the Tribunal, a Federal Court can review the Tribunal's decision. The Federal Court is not able to change the decision of the Tribunal, but it can refer the issue 'back to the Commission or Tribunal to look at [the decision] again'.<sup>669</sup> The Tribunal can dismiss the claim or find it to be substantiated. In the event the latter occurs, the

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<sup>662</sup> *Employment Equity Act 1995 (EEA 1995)*, s 3.

<sup>663</sup> Roberts et al, above n 649, 47.

<sup>664</sup> *CHRA 1977* s 16 (2).

<sup>665</sup> *Ibid* s 53 (2).

<sup>666</sup> Canadian Human Rights Commission, *Canadian Human Rights Commission Annual Report 2010* (2011), 2.

<sup>667</sup> *Ibid*; *CHRA 1977* s 48.1, 49, 52.

<sup>668</sup> *CHRA 1977* ss 48.9 (3), 50; see also Canadian Human Rights Commission, *Your Guide to Understanding the Canadian Human Rights Act – Rights – Responsibility – Respect* (2010) 10, 13.

<sup>669</sup> *CHRA 1977* s53(2), Canadian Human Rights Commission, *Your Guide to Understanding the Canadian Human Rights Act – Rights – Responsibility – Respect* (2010) 10, 13.

Tribunal can order the employer involved to provide various remedies for the victim of the discrimination.<sup>670</sup> Some examples for these remedies are to provide to the victim ‘the rights and privileges that were denied, such as a job, a service or an employment benefit; financial compensation for lost wages or expenses related to the discrimination; financial compensation for the victim’s pain and suffering’, and also special compensation in the event the Tribunal ‘decides that the discrimination was wilful or reckless’.<sup>671</sup>

Another possible remedy involves the implementation of ‘measures to prevent the discrimination [involved] from occurring again, such as changing a policy or putting new procedures in place’.<sup>672</sup> The *CHRA 1977* does not allow for any form of quota system. In this context, the available remedies for the victims of discrimination illustrate that the goal of the *CHRA 1977* is ‘not to punish people’ for their actions, but instead attempts ‘to resolve human rights disputes and prevent them from happening again’.<sup>673</sup> In the event that the Tribunal makes a decision which is reviewed by the Federal Court and referred back to the Tribunal, the new decision of the Tribunal can be ‘appealed by either party under certain circumstances up to the Supreme Court of Canada’.<sup>674</sup> However, the Tribunal has to ensure that its orders conform to the limitations of subsection 54(2).<sup>675</sup> Moreover, subsection 54.1 (2) outlines further limitations on orders of the Tribunal regarding employment equity by stating that:

Where a Tribunal finds that a complaint against an employer is substantiated, it may not make an order pursuant to subparagraph 53(2) (a) (i) requiring the employer to adopt a special program, plan or arrangement containing

- (a) positive policies and practices designed to ensure that members of designated groups<sup>676</sup> achieve increased representation in the employer’s workforce; or
- (b) goals and timetables for achieving that increased representation.

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<sup>670</sup> *CHRA 1977* ss 53 -54’ see also Canadian Human Rights Commission, *Tribunal Hearings* (2008) 5.

<sup>671</sup> *CHRA 1977* ss 53-55, Canadian Human Rights Commission, *Tribunal Hearings* (2008) 5.

<sup>672</sup> *CHRA 1977* s 53 (2) (a), Canadian Human Rights Commission, *Tribunal Hearings* (2008) 6.

<sup>673</sup> *CHRA 1977* s 53 (2) (a), Canadian Human Rights Commission, *Tribunal Hearings* (2008) 5.

<sup>674</sup> Canadian Human Rights Commission, *A Guide to the Canadian Human Rights Act* (2009) 6.

<sup>675</sup> *CHRA 1977* s 54(2).

<sup>676</sup> Designated groups are defined in subsection 54.1 (1) of the CHRA as having the ‘meaning assigned in section 3 of the *Employment Equity Act*’.

Interestingly, this provision seems to prevent the Tribunal from using its power to make an employer adopt a special program as outlined in subparagraph 53(2) (a). For the purpose of interpretation and clarification of subsection 54.1(2) the following subsection 54.1(3) states that:

For greater certainty, subsection (2) shall not be construed as limiting the power of a Tribunal, under paragraph 53(2) (a), to make an order requiring an employer to cease or otherwise correct a discriminatory practice.

In order to interpret the limitation of the usage of special measures regarding orders of the Tribunal under sections 53(2) (a) (i), 54 and 54.1(2), it has to be taken into consideration that these sections refer to section 16, which not only includes special measures for employment matters, but also for other issues, for example, accommodation. Hence, it seems that the limitations outlined in sections 53(2) (a) (i), 54 and 54.1(2) are only meant to restrict special measures regarding employment.

Overall, the *CHRA 1977* does not contain any specific definitions about what special programs are supposed to be, but outlines broadly what they should not include. There are no limitations mentioned in regards to special programs, besides the ones mentioned in sections 53(2) (a) (i), 54 and 54.1(2) which only refer to orders made by the Canadian Human Rights Tribunal in the event of a proven discriminatory practice.<sup>677</sup> There are no temporal or other limits mentioned in the Act in regards to special measures.

#### **IV. SPECIFIC AFFIRMATIVE ACTION LEGISLATION**

The anti-discrimination legislation that has been investigated so far – the *Charter of Rights and Freedoms* of the *Constitution Act 1982* as well as the *CHRA 1977* – all allow for voluntary implementation of employment equity measures and

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<sup>677</sup> Other limitations in the Act regard other matters, for example, limitation periods for the prosecution of discriminatory acts under subsection 60(5).

also offer support and help for individuals who experienced discrimination.<sup>678</sup> Whilst such claims of discrimination have to be brought forward by the victim, which has ‘to carry the risk and burden of seeking redress’, most of these claims are settled at an early stage through conciliation processes.<sup>679</sup> As a result, most of these discrimination cases are not being heard by a Tribunal, which has the judicial power to impose employment equity measures on the employer at fault.<sup>680</sup> This procedure of human rights law is contrasted by employment equity legislation, which is not based on individual claims of discrimination, but on the implementation of policies that aim at the increase of the designated groups involved in the employment sector – Aboriginal peoples, persons with disabilities, visible minorities and women.<sup>681</sup> Furthermore, employment equity legislation has the ‘purpose of correcting, minimizing and preventing systemic discrimination’, which can be defined as ‘patterns of organizational behaviour that are part of the social and administrative structure and culture and decision-making processes of the workplace’, which as a consequence ‘create or perpetuate relative disadvantage for members of some groups and privilege for members of other groups’.<sup>682</sup>

### **A. *Employment Equity Act 1995***

In Canada, statutory affirmative action regarding employment is implemented under the *Employment Equity Act 1995*.<sup>683</sup> The *EEA 1995*<sup>684</sup> was firstly introduced in 1986, after a series of government reports pointed to systemic discrimination<sup>685</sup> in employment against women and minority groups.<sup>686</sup> In 1995,

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<sup>678</sup> Carol Agocs, ‘Canada’s Employment Equity Legislation and Policy 1987 – 2000: the Gap between Policy and Practice’ (2002) 23(3) *International Journal of Manpower* 259.

<sup>679</sup> Ibid.

<sup>680</sup> Ibid.

<sup>681</sup> Ibid.

<sup>682</sup> Ibid 257-8.

<sup>683</sup> In addition to this employment equity legislation, the federal government of Canada implemented a Federal Contractors’ Employment Equity Program, which regulates the eligibility of companies with more than 100 employees for government contracts regarding goods and services of \$200 000 or more. Eligible employers need to create ‘employment equity programs aimed at identifying and eliminating discriminatory barriers, increasing representation of designated groups at all levels of the workplace and monitoring equity progress’. Colleen Sheppard, ‘Challenging Systemic Racism in Canada’ in Elaine Kennedy-Dubourdieu (ed), *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate, 2006) 48.

<sup>684</sup> *The Employment Equity Act 1995*, c44 is abbreviated ‘EEA’ in this thesis.

<sup>685</sup> See Chapter 2 for the definition of systemic discrimination.

the *EEA 1995* underwent significant amendments to strengthen it after a Parliamentary committee decided ‘that changes were necessary if the legislation was to become an effective tool’.<sup>687</sup> These changes included, inter alia, the enhancement of its enforcement mechanisms,<sup>688</sup> the inclusion of the Canadian public service,<sup>689</sup> and the clarification of employer’s obligations regarding employment equity programs<sup>690</sup> including the requirement of determining goals and timetables for these programs.<sup>691</sup> The amendment of the *EEA 1995* was also regarded as a necessity in the context of Canada’s responsibility to take ‘its international commitments seriously’ - including its commitment to *CERD* and *CEDAW*.<sup>692</sup> Canadian provinces and territories have implemented their own legislation in relation to employment equity, but ‘no province has a law that is analogous with the federal *Employment Equity Act*’.<sup>693</sup>

The *EEA 1995* uses the term ‘employment equity’ instead of ‘equal employment opportunities’. It focuses on the equal treatment of men and women in the workplace, and has as its purpose ‘the principle that employment equity means more than treating persons in the same way’ by including the requirement of ‘special measures and accommodation of differences’.<sup>694</sup> The *EEA 1995* applies to certain designated groups, which include not only women, but also ‘aboriginal peoples, persons with disabilities and members of visible minorities’.<sup>695</sup> The

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<sup>686</sup> The government reports concerned are the Abella Commission Report (1984) and the Daudlin Commission Report (1984), which recommended actions against discrimination of women, aboriginal peoples, disabled persons and visible minorities in employment. Furthermore, the Edmond Task Force Report (1990) investigated employment discrimination against these groups in the federal public service. Altogether, these reports led to the enactment of human rights legislation and employment equity legislation in Canada. Harish C Jain et al, *Employment Equity and Affirmative Action: An International Comparison* (M.E. Sharpe Inc, 2003) 21.

<sup>687</sup> Hucker, above n 579, 851.

<sup>688</sup> Sheppard, above n 683, 47.

<sup>689</sup> Furthermore, the military as well as the Royal Canadian Mountain Police were included in the *EEA*. T John Samuel and Aly Karam, ‘Employment Equity for Visible Minorities’ in Leo Driedger and Shivalingappa S Halli (eds), *Race and Racism: Canada’s Challenge* (McGills Queen University Press, 2000) 137.

<sup>690</sup> Joanne D Leck, ‘Making Employment Equity Programs Work for Women’ (2002) 28 *Canadian Public Policy* 87.

<sup>691</sup> Simon Taggar and Harish C Jain, ‘The Status of Employment Equity in Canada: An Assessment’ in Industrial Relations Research Association Series, *Proceedings of the Forty-Ninth Annual Meeting* (Industrial Relations Research Association, 1997) 334, 338.

<sup>692</sup> Parliament of Canada, Debate No 236 about Bill C-64 – *Employment Equity Act* (3 October 1995) 15172 (1345).

<sup>693</sup> United Nations General Assembly Human Rights Council, above n 599, 11.

<sup>694</sup> *EEA 1995*, s2.

<sup>695</sup> *Ibid.*

interpretation of aboriginal peoples is outlined as ‘persons who are Indians, Inuit or Métis’, whilst the members of visible minorities<sup>696</sup> are defined as ‘persons, other than aboriginal peoples, who are non-Caucasian in race or non-White in colour’.<sup>697</sup>

The *EEA 1995* applies to ‘[f]ederally regulated private sector employers and Crown corporations with 100 or more employees’ including ‘approximately 474 private sector employers and 29 Crown corporations, with a combined workforce of over 651 000 employees.’<sup>698</sup> Furthermore, the Act applies to federal departments and agencies employed by the Treasury Board, ‘separate agencies with more than 100 employees in the federal public administration’ as well as ‘other public sector employers including the Canadian Forces, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service’.<sup>699</sup> The Act is administered by the Canadian Human Rights Commission (CHRC), which derives its powers not directly from the *EEA 1995*, but from its own Act – the *CHRA 1977*.<sup>700</sup>

Part One of the Act sets out the obligations of potential employers. Under section 5(a) every employer is obliged to implement affirmative action policies (which are called employment equity) based on the identification and elimination of employment barriers within the workplace.<sup>701</sup> Section 5(b) requires employers to

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<sup>696</sup> The term ‘visible minorities’ has been criticised as divisive in Canada, but is still in public use. Caroline Andrew et al, *Electing a Diverse Canada: The Representation of Immigrants, Minorities and Women* (UBC Press, 2009) 8-9.

<sup>697</sup> *EEA 1995*, s3.

<sup>698</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 4. See also *EEA 1995*, s 4. Private sector employers are defined in section 3 of the EEA as ‘any person who employs one hundred or more employees on or in connection with a federal work, undertaking or business as defined in section 2 of the *Canada Labour Code* and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees, but does not include (a) a person who employs employees on or in connection with a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut, or (b) a departmental corporation as defined in section 2 of the *Financial Administration Act*’.

<sup>699</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 4.

<sup>700</sup> Falardeau-Ramsay, above n 581, 170.

<sup>701</sup> The complete section 5 states that ‘Every employer shall implement employment equity by (a) identifying and eliminating employment barriers against persons in designated groups that result from the employer’s employment systems, policies and practices that are not authorized by law; and (b) instituting such positive policies and practices and making such reasonable

implement positive policies and practices to ‘ensure that persons in designated groups achieve a degree of representation ... in the employer’s workforce that reflects their representation in ... the Canadian workforce’.<sup>702</sup> The term ‘positive policies and practices’ can be defined as initiatives that support the establishment of ‘a respectful and responsive working environment for all employees, including designated group members, and that help attract increased numbers of individuals from under-represented designated groups into the organization’s workforce’.<sup>703</sup> Such positive policies and practices are designed to ‘go beyond the mere elimination of barriers’ by replacing them ‘with a favourable work environment that actively promotes a representative workforce’, for example by the ‘establishment of an anti-harassment policy’.<sup>704</sup>

Section 9 obliges potential employers to collect information and conduct an analysis and review of the employer’s workforce, ‘in order to determine the underrepresentation of persons in designated groups in each occupational group in that workforce’ and to ‘identify employment barriers against designated groups’ in the ‘employer’s employment systems, policies and practices’.<sup>705</sup>

Section 6 of the Act establishes limits to the requirement to implement employment equity measures. Firstly, it is not necessary to implement employment equity measures if they ‘would cause undue hardship to the employer’; secondly there is no need to hire or promote persons without the ‘essential qualifications for the work to be performed’; thirdly a public sector employer is allowed to apply the *Public Service Employment Act* if hiring or promotion has to be based on merit; and finally, no employer has ‘to create new positions in its workforce’ in order to comply with the *EEA 1995*.<sup>706</sup>

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accommodation as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer’s workforce that reflects their representation in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees’.

<sup>702</sup> *EEA 1995*, s 5(b).

<sup>703</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 9.

<sup>704</sup> *Ibid.*

<sup>705</sup> *EEA 1995*, s9 (1) (a), (b).

<sup>706</sup> *Ibid* s6.



Section 10(1) of the Act outlines what an employment equity plan (affirmative action) of an employer has to include in order to eliminate underrepresentation of designated groups, starting with the requirement of the specification of ‘positive policies and practices’ in regards to ‘hiring, training, promotion and retention of persons in designated groups’ as well as measures regarding reasonable accommodation. The Act requires long term goals and strategies of over 3 years in duration have to be set by the employment equity plan to eliminate underrepresentation. In addition, short term measures of between 1 and 3 years have to be identified, and a timetable established for their implementation. These short term measures are applied annually and have to include numerical goals for hiring and promotion of the groups concerned.<sup>707</sup> In relation to short term goals, s 10(2) requires potential employers to consider the degree of underrepresentation, the availability of qualified persons in designated groups, and the anticipated growth and turnover of employees of an employer’s workforce within a short term employment equity timetable.<sup>708</sup>

Potential employers are responsible for ensuring the reasonable progress of their employment equity plans including a duty to monitor their plans on a regular basis and to undertake periodic review and revision of their plans to ensure progress towards employment equity.<sup>709</sup>

Under section 13 of the Act, required revisions include updating short term numerical goals, and adapting to changing circumstances in order to achieve the desired goals.<sup>710</sup> Sections 17 to 21 contain the exact procedures for establishing, maintaining and filing employment equity records, which have to include information about the ‘employer’s workforce, the employer’s employment equity plan and the implementation of employment equity by the employer’.<sup>711</sup>

The enforcement of compliance under the *EEA 1995* is regulated in Part II (sections 22 to 34) and the assessment of monetary penalties for non-compliance with the Act is outlined in Part III (sections 35 to 40). Interestingly, the *EEA*

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<sup>707</sup> Ibid s10.

<sup>708</sup> Ibid s10(2).

<sup>709</sup> Ibid s11,12.

<sup>710</sup> Ibid s13.

<sup>711</sup> Ibid s17.

1995 does not penalise employers who fail to implement employment equity in accordance to the *Criminal Code* of Canada.<sup>712</sup> Instead, there are monetary penalties ranging from \$10,000 to \$50,000 for private sector employers who fail to file an employment equity report, or who fail to include the relevant information in the report.<sup>713</sup>

How exactly numerical goals are to be determined for short term plans is not specified by the Act.<sup>714</sup> It would seem that numerical goals do not include quotas as section 33 (1) (e) prohibits the Commission from imposing quotas on employers.<sup>715</sup> Section 33 (2) of the *EEA 1995* defines a quota as ‘a requirement to hire or promote a fixed and arbitrary number of persons during a given period’.<sup>716</sup>

Another important feature of the *EEA 1995* is that employment equity measures have to be reviewed and updated frequently.<sup>717</sup> Section 13 of the Act empowers potential employers to make ‘any other changes that are necessary’ in regards to the effectiveness of their employment equity plan, and ‘as a result of changing circumstances’.<sup>718</sup> Moreover, employers have to report about their implementations of quantitative and qualitative measures to eliminate employment discrimination.<sup>719</sup>

In the end, the *EEA 1995* aims at structural changes within Canadian workplaces to eliminate discrimination of designated groups without focusing on past

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<sup>712</sup> Morley Gunderson, Douglas Hyatt and Sara Slinn, ‘Employment Equity in Canada and the United States’ in Paula B Voos (ed), *Industrial Relations Research Association Series - Proceedings of the 54<sup>th</sup> Annual Meeting* (2002) 147; *Employment Equity Act 1995*, s 35 (3).

<sup>713</sup> *Employment Equity Act 1995*, c 44, s 35. Section 36(2) states that ‘the amount of a monetary penalty shall not exceed (a) \$10,000 for a single violation; and (b) \$50,000 for repeated or continued violations’.

<sup>714</sup> Rhoda E Howard-Hassmann, ‘Sins of the Fathers – Canadian civic leaders discuss employment equity’ (2002) 21 *Windsor Yearbook of Access to Justice* 256-7. Section 5(b) of the *EEA* outlines that designated groups have to be represented ‘in each occupational group in the employer’s workforce that reflects their representation in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography’.

<sup>715</sup> *EEA 1995*, s33 (1) (e).

<sup>716</sup> *Ibid* s33 (2).

<sup>717</sup> *Ibid* s13.

<sup>718</sup> *Ibid* s12 (b), 13.

<sup>719</sup> Taggar et al, above n 691, 338.

culpability of discriminators.<sup>720</sup> To achieve this, the *EEA 1995* requires the application of temporal limits of employment equity plans, but does not contain an overarching end point for employment equity measures.

## V. IMPLEMENTATION OF AFFIRMATIVE ACTION

In Canada, there are two mandatory federal employment equity programs – the Legislated Employment Equity Program (LEEP) and the Federal Contractors Program (FCP). LEEP is within the *EEA 1995* and applies to federally regulated employers, whilst the FCP regulates those employers that are in business with the government, but do not fall under the *EEA 1995*.<sup>721</sup> It has been demonstrated above that the *CHRA 1977* is administered by the Canadian Human Rights Commission in conjunction with the Canadian Human Rights Tribunal, and that both institutions play important roles in the implementation and administration of employment equity measures under the *EEA 1995*. Even though LEEP applies to all federally regulated employers, the largest sector it applies to is the federal public service. Therefore, this section focuses on the implementation of the LEEP in the federal public service, which is administered by the Public Service Commission under the *Public Service Employment Act 2003* in reference to the *EEA 1995*, and the implementation of employment equity measures under the FCP in order to investigate whether or not these federal programs apply temporal limits to employment equity.

### A. *Legislated Employment Equity Program (LEEP)*

In the light of the fact that the federal public service is the largest employer in the country, it seems to be important for Canada to ‘create a representative public service’, which is ‘reflective of the diversity of Canada and Canadians’, and that could lead the way for the establishment of a ‘nation-wide environment that is

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<sup>720</sup> John Hucker, ‘Anti-Discrimination Laws in Canada: Human Rights Commissions and the Search for Equality’ (1997) 19 *Human Rights Quarterly* 3, 566.

<sup>721</sup> Taggar et al, above n 691, 331.

supportive of diversity and open to difference'.<sup>722</sup> The preamble of the *Public Service Employment Act 2003*,<sup>723</sup> which regulates and administers employment in the federal public service, states that 'Canada will continue to gain from a public service that ... is representative of Canada's diversity'.<sup>724</sup> Hence, the Canadian government commits itself to represent Canada's diversity within the workforce of its public service. In order to ensure such a representative public service, employment equity measures have been applied by governmental departments and agencies.

The implementation of employment equity in the federal public service is administered by various government agencies, of which the most important is the Public Service Commission of Canada (PSC). The PSC is an 'independent staffing agency' that is responsible for the administration of the *Public Service Employment Act*.<sup>725</sup> It consists of 16 district and regional offices across Canada,<sup>726</sup> and is responsible for identifying and removing 'barriers in its systems, policies, and practices in recruitment and staffing'.<sup>727</sup> In this context, the PSC administers and approves employment equity staffing programs to assist departments to achieve their employment equity targets as well as developing initiatives to change the corporate culture of the public sector.<sup>728</sup>

In addition to the PSC, the Public Service Human Resources Management Agency (PSHRMAC) is also responsible for the monitoring and implementation of employment equity in the federal public service.<sup>729</sup> The PSHRMAC develops 'human resource planning and accountability frameworks necessary to achieve the Act's goals'.<sup>730</sup> The PSHRMAC is also responsible for the support of departments in terms of training, and monitors departmental performance in

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<sup>722</sup> The Senate Canada, Standing Senate Committee on Human Rights, *Employment Equity in the Federal Public Service – Not There Yet* (2007) 3-5.

<sup>723</sup> S.C. 2003, c. 22, ss. 12, 13, this Act came into force in 2005.

<sup>724</sup> *Public Service Employment Act 2003*, Preamble.

<sup>725</sup> Luc Juillet and Ken Rasmussen, *Defending a Contested Ideal: Merit and the PSC of Canada 1908-2008* (University of Ottawa Press, 2008) 4-5.

<sup>726</sup> The Senate Canada, above n 722, 8.

<sup>727</sup> Ibid.

<sup>728</sup> Ibid.

<sup>729</sup> Ibid 7.

<sup>730</sup> Ibid.

relation to employment equity.<sup>731</sup> The PSHRMAC and the PSC both play an important role in the implementation and monitoring of employment equity in the federal public service, and have both to report annually to the Parliament about their progress regarding this matter.<sup>732</sup>

Despite the Canadian government's commitment to represent Canada's diversity within the workforce of its public service, there has been a steady underrepresentation of certain groups of society by it – namely Aboriginal people, disabled persons, visible minorities and women.<sup>733</sup> Over time, there have been various attempts by the Public Service Commission to increase the level of representation of these groups in the federal public service of Canada. One such plan is the *Embracing Change Action Plan*, which was launched in June 2000.<sup>734</sup> Canadian government officials hoped this initiative could 'be a turning point in the history of the federal public service' in regards to employment equity.<sup>735</sup> This plan was implemented because the federal government had not achieved its employment equity objectives and goals for visible minorities up to that time.<sup>736</sup>

Surprisingly, employment equity in the federal public service lagged behind the private sector. It was assumed that this was due to 'a lack of government-wide commitment and leadership' in relation to employment equity.<sup>737</sup> In response, the *Embracing Change Action Plan* aimed to change the corporate culture in the federal public service by 'getting the numbers [of visible minorities] up' to a 'critical mass'.<sup>738</sup> The action plan recommended the setting of benchmarks 'to seize the opportunity to make progress over a short period' of time.<sup>739</sup> Nevertheless, it did not recommend the setting of quotas for visible minorities.

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<sup>731</sup> Ibid 8.

<sup>732</sup> Ibid.

<sup>733</sup> This statement is proven by the following paragraphs that investigate several annual reports of the Public Service Commission.

<sup>734</sup> The Senate Canada, above n 722, 10. The *Embracing Change Action Plan* intended to reassemble 'various organizations and laws within the framework of a new action plan to promote employment equity in federal public service': at 10.

<sup>735</sup> Task Force on the Participation of Visible Minorities in the Federal Public Service, *Embracing Change in the Federal Public Service* (2000) 1.

<sup>736</sup> Ibid 2.

<sup>737</sup> Ibid 2, 5.

<sup>738</sup> Ibid 2.

<sup>739</sup> Ibid 3.

Instead it required plans to comply with the principle of selection based on merit.<sup>740</sup>

The *Embracing Change Action Plan* was supposed to show results in regards to an enhanced representation of visible minorities in the federal public service within a timeframe of three to five years starting in the year 2000.<sup>741</sup> A benchmark was set for ‘the recruitment and advancement of visible minorities’ in the federal public service for a limited time.<sup>742</sup> In setting an attainable benchmark, the action plan was guided by the order of the Supreme Court in the case *Canadian National Railway v Canada*,<sup>743</sup> which required the hiring of ‘at least one woman for every four non-traditional jobs’ until women would represent 13 percent of the staff in the future.<sup>744</sup>

The *Embracing Change Action Plan* set a ‘1 in 5’ benchmark for the hiring of visible minorities in the federal public service for a period of 5 years. In other words, in this period, one in every five people hired by the government had to belong to a visible minority group.<sup>745</sup> At the beginning of the action plan in 2000, only one person out of seventeen employees of the whole public service, and one in thirty-three persons at management levels were visible minorities and women in the federal public service.<sup>746</sup> This situation had not been in line with federal affirmative action (employment equity) legislation, which requires that visible minority workforces should be represented in governmental departments to a rate which would be ‘at least equal to labour market availability (LMA), as calculated by departments’ (involved) in accordance to census data.<sup>747</sup>

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<sup>740</sup> Ibid.

<sup>741</sup> Ibid 4.

<sup>742</sup> Ibid 5.

<sup>743</sup> [1987] 1 SCR 1114, 1115.

<sup>744</sup> Task Force on the Participation of Visible Minorities in the Federal Public Service, above n 735, 5.

<sup>745</sup> Ibid 6. The goal benchmark of the action plan aimed more explicitly at ‘a 1 in 5 share of external recruitment for term (in excess of three months) and indeterminate appointments, to be attained as an annual rate by 2003; a 1 in 5 share of acting appointments at the levels of executive feeder groups, to be attained as an annual rate by 2005’; and ‘a 1 in 5 share of entry into executive feeder groups and executive levels to be attained as an annual rate by 2005’: at 6.

<sup>746</sup> Ibid 20.

<sup>747</sup> Ibid 21. The underrepresentation of visible minorities in the federal public service is proven by the fact that ‘in 1999 the public service-wide population of visible minorities was 5.9 per cent of all employees, well short of the LMA of 8.7 per cent for the public service as a whole’: at 23.

The progress and results of the *Embracing Change Action Plan* were evaluated in an annual report to Parliament by the Public Service Commission in 2004-2005. The report stated that even though improvements in employment equity had been achieved in regards to Aboriginal people, disabled persons and women, the employment situation of visible minorities in the federal public service had remained nearly the same.<sup>748</sup> By the following year, the numbers of visible minorities in the federal public service had slightly increased,<sup>749</sup> but progress in subsequent years was minimal.

In 2007, the recruitment rate of visible minorities showed a decline ‘from 9.8% in 2005-2006 to 8.7% in 2006-2007’, even though it had been a year of increased overall recruitment in the public service.<sup>750</sup> There was, however, notable progress in regards to ‘entry appointments of visible minorities to the Executive Group’, which was attributed to the use of ‘special recruitment strategies’<sup>751</sup> and effective monitoring procedures by the Public Service Commission and the governmental departments involved.<sup>752</sup> Furthermore, a slight increase in the representation of women was reported ‘from 53.5% in 2005 to 53.8% in 2006-2007, while the representation of both Aboriginal people and persons with disabilities remained unchanged’.<sup>753</sup>

The attempt to achieve the elimination of racial and gender discrimination in the public service through employment equity has been a longstanding process. In 2007, the Standing Senate Committee on Human Rights published a report regarding this issue with the revealing title ‘Employment Equity in the Federal

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<sup>748</sup> Public Service Commission of Canada, *2004-2005 Annual Report* (online) 28 May 2011 <[http://www.psc-cfp.gc.ca/arp-rpa/2005/ch2-eng.htm#N2\\_3\\_4](http://www.psc-cfp.gc.ca/arp-rpa/2005/ch2-eng.htm#N2_3_4)>.

<sup>749</sup> Public Service Commission of Canada, *2005-2006 Annual Report: Highlights* (online) 28 May 2011 <<http://www.psc-cfp.gc.ca/arp-rpa/2006/hl-ps-eng.htm>>. The report states that ‘[t]here has been an increase in the numbers of visible minorities in the public service. Their representation as of March 31, 2005 was only 8.1%, despite their workforce availability of 10.4%’: at IV 2.

<sup>750</sup> Public Service Commission of Canada, *2006-2007 Annual Report* (2007) 5.

<sup>751</sup> Specialized recruitment programs are, for example, the Federal Work Experience Program. Specialized recruitment programs are ‘aimed at both students and recent post-secondary graduates. In 2006-2007, the use of specialized recruitment programs continued to increase, as organizations and functional communities strove to attract and hire a diverse, representative and competent public service workforce’. Public Service Commission of Canada, *2006-2007 Annual Report* (2007) 108, 116.

<sup>752</sup> *Ibid* 6.

<sup>753</sup> *Ibid* 58.

Public Service – Not There Yet’.<sup>754</sup> The report investigated the employment situation of designated groups, which include Aboriginal people, persons with disabilities, visible minorities and women in the Federal Public Service of Canada. It concluded that even though the representation of Aboriginal people, persons with disabilities and women has increased over time, the overall result reveals that ‘all of the designated groups are not well represented in executive level or across all occupational groups’.<sup>755</sup> The report also referred to the *Embracing Change Action Plan* by stating that ‘visible minorities remain the one group not equitably represented on a broad scale within the federal public service’.<sup>756</sup> Furthermore, the report pointed out that even though ‘the government’s initiatives [including the *Embracing Change Action Plan*]’ aimed at ‘recruiting one in five from members of visible minority groups’, the desired benchmark had not been reached, and the ‘federal public service continues to trail behind the private sector in terms of visible minority representation’.<sup>757</sup>

Other initiatives to increase the level of representation of visible minorities have been conducted by the Public Service Human Resources Management Agency (PSHRMAC), which ‘has devised various training programs, best practices, and tool kits to assist departments’ in regards to this matter.<sup>758</sup> Overall, the report of the Standing Senate Committee not only revealed disappointment at the slow progress of employment equity measures in the federal public service, but also general uncertainty of the time needed to accomplish employment equity in the federal public service of Canada.<sup>759</sup> It was concluded that ‘[w]orking in benchmarks and numbers is not enough’, and that there needed to be a change in corporate culture and a rise in the accountability for the progress of the implementation of employment equity in the federal public service.<sup>760</sup> The report concluded that ‘employment equity in the federal public service remains a

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<sup>754</sup> The Senate Canada, Standing Senate Committee on Human Rights, above n 722.

<sup>755</sup> Ibid 1.

<sup>756</sup> Ibid 12.

<sup>757</sup> Ibid.

<sup>758</sup> Ibid 15.

<sup>759</sup> Ibid 23.

<sup>760</sup> Ibid 27-9.



serious issue that cannot be presumed to get better with time', and that the only solution would be to continuously work at it.<sup>761</sup>

The implementation of employment equity in the federal public service has been taken very seriously by the Canadian government and despite its failure to achieve the desired results for visible minorities in 2005, the efforts to finally achieve these goals have remained. The *Public Service Employment Act* aims to guarantee diversity in its workforce that mirrors the diversity of Canada's population, and therefore the Public Service Commission has embraced employment equity measures (affirmative action) to ensure this goal can be achieved.

In 2008-2009, the Public Service Commission reported that 'the representation of three employment equity (EE) groups – women, Aboriginal peoples and persons with disabilities – in the public service [were] above their respective workforce availability (WFA)'.<sup>762</sup> Also, the appointment rates for visible minorities were shown to have 'increased steadily, from 15.6% in 2006-2007 to 17.3% in 2007-2008 to 18.8% in 2008-2009' (which was well above their workforce availability rated 12.4% in 2006).<sup>763</sup> The 2009-2010 report of the PSC stated that 'three of the four designated groups are now being appointed to the public service at a proportion exceeding their workforce availability'.<sup>764</sup> The appointment of visible minorities had increased from 18.8% in 2008-2009 to 21.2% in 2009-2010.<sup>765</sup> Even though the number of appointments for women to the public service had declined from 57.1% in 2008-2009 to 55.5% in 2009-2010, the rate of appointments stayed well above their workforce availability rate of 52.3% (measured with 2006 data).<sup>766</sup>

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<sup>761</sup> Ibid 33.

<sup>762</sup> Public Service Commission of Canada, *2008-2009 Annual Report* (2009) 50, 53. The term 'workforce availability' is defined as relating to 'the distribution of people in the designated groups as a percentage of the total Canadian workforce. For the purposes of the federal public service, workforce availability is based only on those occupations in the Canadian workforce that correspond to the occupational groups in the public service. The estimates used for the designated groups are based on the 2006 Census Data': at 197.

<sup>763</sup> Ibid 9, 53.

<sup>764</sup> Public Service Commission of Canada, *2009-2010 Annual Report* (2010) 52.

<sup>765</sup> Ibid 54.

<sup>766</sup> Ibid. The workforce availability data of 2006 'was provided by the Office of the Chief Human Resources Officer': at 54.

The improved rates of appointments for the designated groups are mirrored in their representation rates of the federal public service.<sup>767</sup> Overall, the representation of designated groups in the federal public service reveals in accordance to its latest available data that women ‘are employed at a rate of 2.4 percentage points above their general workforce availability rate’, whilst Aboriginal people are employed ‘at a rate of 1.5 percentage points above their workforce availability rate, and persons with disabilities’ are employed at a ‘rate of 1.9 percentage points above their workforce availability rate’.<sup>768</sup> This long awaited and most welcomed result is contrasted by the employment situation for visible minorities in the federal public service, which appears to be quite different from other designated groups, with a representation ‘rate of 2.6 percentage points below their general workforce availability rate’.<sup>769</sup> However, the Public Service Commission concluded that even though visible minorities remain underrepresented in the public service, latest recruitment trends showed a positive increase in their numbers.<sup>770</sup>

### **B. Federal Contractors Program**

The Federal Contractors Program (FCP) was established in 1986, the same year in which the first *Employment Equity Act 1986* was enacted, which was amended in 1995 and resulted in the *EEA 1995* (also known as Legislated Employment Equity Program or LEEP).<sup>771</sup> In contrast to the LEEP (*EEA 1995*), the Federal Contractors Program is a voluntary non-statutory program, which is administered

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<sup>767</sup> It has to be noted that appointment rates and representation rates for the designated groups involved in the federal public service are two ‘entirely different things and are measured by two entirely different agencies. Representation rate figures are provided by the Office of the Chief Human Resources Officer (OCHRO). They demonstrate the rate at which employees from the four employment equity groups are represented in the workforce of the core public administration of the federal public service’. The Senate Canada, Standing Senate Committee on Human Rights, *Reflecting the Changing Face of Canada: Employment Equity in the Federal Public Service* (2010) 33-4.

<sup>768</sup> Ibid 31.

<sup>769</sup> Ibid.

<sup>770</sup> Public Service Commission of Canada, *2009-2010 Annual Report* (2010) 53.

<sup>771</sup> Brenda Cardillo, ‘Perspectives on Labour and Income – Defining and Measuring Employment Equity’ (1993) 5(4) *Statistics Canada*, article no 6, 3.

by Human Resources and Skills Development Canada.<sup>772</sup> The voluntary nature of the FCP results from the fact that ‘no employer is required to do business with the federal government’.<sup>773</sup> Only companies that aim to do business with the federal government are required to make an ongoing commitment to the implementation of employment equity measures for the duration of their contract and beyond.<sup>774</sup>

The idea behind the establishment of the FCP is to ‘induce change by controlling funding’ for the companies that decide to do business with the Canadian government.<sup>775</sup> However, the FCP only applies to employers ‘that have 100 or more employees, and who wish to sell goods or services to the federal government valued at \$200,000 or more’ fall under the FCP.<sup>776</sup> Therefore, such companies have to implement employment equity measures ‘as a condition of bidding on contracts with the government’.<sup>777</sup> As a first step, a company that wishes to do business with the Canadian government has ‘to sign a commitment to employment equity and agree to implement a series of steps leading to the implementation of an employment equity plan’.<sup>778</sup>

In the event that an employer receives a government contract after the bidding procedure is completed, the commitment has to be fulfilled by implementing the employment equity plan.<sup>779</sup> There is no requirement to submit such an employment equity plan to the government, ‘only a commitment to develop and implement such a plan’ which then can be ‘subject to on-site compliance reviews’.<sup>780</sup> Altogether, up to twelve criteria have to be met to fulfil an

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<sup>772</sup> Ronald J Burke and Eddy SW Ng, ‘A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms’ (2010) 27(3) *Canadian Journal of Administrative Sciences* 225.

<sup>773</sup> *Ibid* 227.

<sup>774</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 5.

<sup>775</sup> Burke and Ng, above n 772, 227.

<sup>776</sup> Agocs, above n 678, 260.

<sup>777</sup> *Ibid*.

<sup>778</sup> R D Osborne, ‘Emerging Equality Policy in Britain in Comparative Context: A Missed Opportunity?’ (2008) 28(5) *Public Money & Management* 306.

<sup>779</sup> *Ibid*.

<sup>780</sup> Taggar et al, above n 691, 333.

employment equity plan required by the FCP.<sup>781</sup> These twelve FCP requirements ‘provide contractors with the basis for planning, implementing and maintaining an effective employment equity program’, and also help workplace equity officers to evaluate the employer’s compliance under the FCP.<sup>782</sup> In 2010, the Canadian government estimated that the FCP covered 936 federal contractors, representing 1,121,965 employees or approximately 6.9% of Canada’s workforce.<sup>783</sup>

In order to comply with the FCP, an employer has to initiate an employment equity program by, for example, putting in ‘place an accountability mechanism for the employment equity process’ and assigning ‘accountability to a senior official’.<sup>784</sup> Furthermore, an employer under the FCP has to announce ‘the purpose of employment equity to all employees’ in order to demonstrate commitment to the goals of employment equity.<sup>785</sup> Companies are encouraged to establish and provide training to an Employment Equity Committee, which is supposed to develop an action plan to ‘promote and implement employment equity’ as well as to identify ‘specific needs of designated groups’ within the companies involved.<sup>786787</sup> Another important requirement for companies under the FCP is the collection of workforce data, including representation data, ‘hire, promotion and termination data (flow data)’, and ‘salary data’. Much of this data is collected from questionnaires and workforce surveys and is used to ‘develop measures and establish short- and long-term goals to improve the representation of designated groups’ in the companies involved.<sup>788</sup>

Regular employment equity reviews have to be conducted which have to include data about ‘recruitment, selection and hiring; training and development; promotion; retention and termination; reasonable accommodation; and attitudes

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<sup>781</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 15.

<sup>782</sup> Ibid 16.

<sup>783</sup> Burke and Ng, above n 772, 225.

<sup>784</sup> Labour Canada - Human Resources and Skills Development Canada, *Employment Equity in Your Workplace – Federal Contractors Program Step 1: Initiating an Employment Equity Program* (2009) 5.

<sup>785</sup> Ibid 9.

<sup>786</sup> Ibid 20.

<sup>787</sup> Ibid 21.

<sup>788</sup> Ibid 25.

and corporate culture'.<sup>789</sup> In addition, employers under the FCP have to implement a 'sustainable employment equity plan', which is supposed to eliminate employment barriers for designated groups by establishing 'special measures targeted to increase the representation of under-represented designated groups; short-term hiring and promotion goals' as well as 'long-term representation goals' to eliminate under-representation; and 'clear time frames and accountability measures' together with 'a system for monitoring and revising employment equity plans over time'.<sup>790</sup> Special measures can include 'outreach and recruitment; advertising; education and training programs; job rotation; career development programs; mentoring programs; sponsored trade school training; and co-op placement'.<sup>791</sup>

Even though 'the revised *Employment Equity Act 1995* required the FCP to become "equivalent" to the legislated program [LEEP]',<sup>792</sup> there remained important differences between the two of them.<sup>793</sup> One of the major differences between these two federal employment equity programs regards the monitoring process of the employment equity measures involved. Unlike employers under the *EEA 1995*, employers under the FCP are not 'required to submit annual reports on their progress' about their implementation of employment equity measures.<sup>794</sup>

Another important difference between the LEEP and the FCP is that 'results and reports of businesses under the FCP are not made public'.<sup>795</sup> The differences in the monitoring process of the FCP and the LEEP indicate that 'businesses under one or the other of these measures [federal employment equity programs] are

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<sup>789</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Step 2 – Employment Systems Review* (2009) 5.

<sup>790</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Step 3 – Creating an Employment Equity Plan* (2009) 1.

<sup>791</sup> Ibid 15.

<sup>792</sup> *Employment Equity Act 1995*, s42(2).

<sup>793</sup> Osborne, above n 778, 306-7.

<sup>794</sup> Ibid 307.

<sup>795</sup> Burke and Ng, above n 772, 225.

subject to different treatment'.<sup>796</sup> However, in the event that an employer is 'subject to the *Employment Equity Act* [LEEP] and then entered into an agreement under the FCP' the employer involved 'must attain the objectives of the most restrictive standard, namely the *Employment Equity Act* [1995]'.<sup>797</sup>

In the event that an employer under the FCP is not able to achieve its employment equity goals, there will be usually no penalty applied by the government.<sup>798</sup> In general, the government expects the employer involved to make 'all reasonable efforts, in good faith, to achieve its goals', and therefore if goals are not met sufficiently, the government implies that the reason for this outcome might be caused by 'unanticipated changes in the resources or activities of an organization, or changes in labour market conditions'.<sup>799</sup> However, if a review of the organisation involved reveals that the employer failed to 'honour the commitment made to implement employment equity', sanctions might be imposed that place the company at fault on the 'Federal Contractors Program List of Ineligible Contractors', which would cause the employer the loss of the 'right to bid on or receive future federal government contracts or standing offers valued at \$25,000 or more'.<sup>800</sup> Contractors can improve the implementation of employment equity under the FCP at their workplace, which might lead to the reinstatement to the FCP and the removal of the sanction from their business.<sup>801</sup> Altogether, the FCP 'is a policy with some teeth and over 60 employers have been barred from federal contracts as a result of not being in compliance' with it.<sup>802</sup>

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<sup>796</sup> Lucie Lamarche et al, *Retaining Employment Equity Measures in Trade Agreements* (2005) 20.

<sup>797</sup> Ibid.

<sup>798</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 26.

<sup>799</sup> Ibid.

<sup>800</sup> Ibid 28.

<sup>801</sup> Ibid 30.

<sup>802</sup> Osborne, above n 778, 307.

## VI. CONCLUSION

The Canadian government takes its obligation to implement special measures in form of employment equity seriously. It has introduced extensive legislation to increase the representation of four disadvantaged groups as defined in federally regulated employment sectors - Aboriginal peoples, disabled persons, visible minorities and women. The legislation that has been investigated in this chapter - namely the *Charter of Rights and Freedoms* of the *Constitution Act 1982*, the *CHRA 1977*, the *EEA 1995*, the *LEEP* of the federal public service and the *FCP 1986* – are all supportive of the implementation of employment equity, which gives these policies a solid legal foundation, unlike in the United States, where these policies are not embedded in the *Constitution* and only rely on presidential executive orders and federal regulations. Moreover, the Canadian Supreme Court is undoubtedly supportive of employment equity, unlike in the United States, where the United States Supreme Court is highly suspicious of these policies.

For the purpose of this thesis, what is striking about the equity plans in Canada is that they are supported by a comprehensive plan for measuring their progress. When targets were not met, or progress not deemed acceptable, new initiatives were implemented until results were achieved. Having identifiable targets and being able to monitor progress against them is important to the success of the equity plans. It is also important for the continued justification of the plans over time. Another striking feature is the setting of short and long term goals which provide definite points at which plans could be reassessed against established targets.

There is nothing in the plans to say when their operation will have run its course. At this point in time, the goals of employment equity have not been completely met by the measures applied in the federal public service, and it is difficult to predict when it will be completely achieved. In this context, in 2007, the President of the Public Service Commission stated that ‘[w]hile we continue to believe that the gap [between workforce availability and actual representation of designated groups in the federal public service] can be closed, we are concerned

with how long it will take us to get there'.<sup>803</sup> Moreover, in 2008 the Chief Commissioner of the Canadian Human Rights Commission commented on the employment equity situation in the federal public service by stating that 'indeed, we are not even near there yet'.<sup>804</sup> There is, then, a difficult question for the future of when employment equity has been achieved and the plans can be ceased altogether. If employment rates of the beneficiary groups continue to run above their workforce availability, the beneficiary groups will soon be proportionately represented in the public service. At this point, if not before, the affirmative action programs are no longer be justifiable in theory, under s 15(2) of the Charter, or according to Canada's obligations under *CERD* or *CEDAW*.

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<sup>803</sup> The Senate Canada, Standing Senate Committee on Human Rights, *Reflecting the Changing Face of Canada: Employment Equity in the Federal Public Service* (2010) 1. This statement was made by Maria Barrados, President of the Public Service Commission, 23 April 2007.

<sup>804</sup> *Ibid.* This statement was made by Jennifer Lynch, Chief Commissioner of the Canadian Human Rights Commission, 4 February 2008.



## **CHAPTER SIX**

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### **THE LIMITS OF AFFIRMATIVE ACTION IN AUSTRALIA**

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### THE LIMITS OF AFFIRMATIVE ACTION IN AUSTRALIA

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## I. INTRODUCTION

Australia, like Canada and the United States, is a country of immigration. Australia has welcomed around seven million immigrants since 1945 into a nation of 22 million people, of which '44 per cent were born overseas or have a parent who was'.<sup>805</sup> Immigration accounts for approximately 60 per cent of Australia's population growth.<sup>806</sup>

Since the 1960s, Australian governments have implemented several policies focussing on inclusion and fairness as 'guiding principles that promote participation in social, economic and civic aspects of Australian life'.<sup>807</sup> The current Australian Prime Minister, Julia Gillard, who came to Australia as an immigrant herself,<sup>808</sup> introduced the Australian Government's new multicultural policy called 'The People of Australia' in 2011, which has at its heart the reaffirmation and 'support for a culturally diverse and socially cohesive nation' with the focus on 'equality and a fair go for all'.<sup>809</sup> The Australian expression of having a 'fair go for all' means in general to ensure that equal treatment and equal opportunities are guaranteed for everybody without regard to gender, race, ethnicity or religion within the Australian society.<sup>810</sup> Affirmative action plays a crucial role in achieving these equal opportunities based on an Australian legal system that supports the elimination of gender and racial discrimination.

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<sup>805</sup> Australian Government, Department of Immigration and Citizenship, *The People of Australia – Australia's Multicultural Policy* (February 2011) 2.

<sup>806</sup> *Ibid.* Australian Government, Department of Immigration and Citizenship, *The People of Australia – The Australian Multicultural Advisory Council's Statement on Cultural Diversity and Recommendations to Government* (April 2010) 15.

<sup>807</sup> Australian Government, Department of Immigration and Citizenship, *The Response to the Recommendations of the Australian Multicultural Advisory Council in The People of Australia* (February 2011) 1.

<sup>808</sup> Australian Government, Department of Immigration and Citizenship, *The People of Australia* (February 2011), above n 805, iv.

<sup>809</sup> *Ibid.* v.

<sup>810</sup> Australian Government, Department of Immigration and Citizenship, *The People of Australia* (April 2010), above n 2, 12; Geoffrey Brahm Levey, 'The Political Theories of Australian Multiculturalism' (2001) 24 (3) *University of New South Wales Law Journal* 873; see also United Nations, Human Rights Council General Assembly, Fourteenth Session, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Githu Muigai (21 May 2010) 7.

The beginning of the era of anti-discrimination legislation in Australia started shortly after the establishment of the *Title VII*, which prohibited racial discrimination in the United States.<sup>811</sup> South Australia enacted the first anti-discrimination law in regards to race and gender in Australia – the *Prohibition of Discrimination Act 1966 (SA)* and the *Sex Discrimination Act 1975 (SA)*. The Commonwealth government soon, enacting the *Racial Discrimination Act 1975 (Cth) (RDA 1975)* and the *Sex Discrimination Act 1984 (Cth) (SDA 1984)*.<sup>812</sup> The passage of the *RDA 1975* and the *SDA 1984* represented historical milestones in racial and gender relations in Australia, and marked the beginning of a social aimed at bridging the gap between equality and liberty.<sup>813</sup>

In order to enhance equal opportunities for women at the workplace, the government introduced the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)*, which was later replaced by the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)* and the *Workplace Gender Equality Act 2012 (Cth)*. This Act is Australia's most specific affirmative action legislation.<sup>814</sup> Under it, the representation of women in higher education and employment has steadily increased over the last decade.<sup>815</sup>

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<sup>811</sup> *Title VII of the Civil Rights Act of 1964*. Ron McCallum, 'Convergences and/or Divergences of Labour Law Systems: The View from Australia' (2007) 28 *Comparative Labour Law and Policy Journal* 461-2.

<sup>812</sup> *Ibid.*

<sup>813</sup> Margaret Thornton and Trish Luker, 'The Sex Discrimination Act and its Rocky Rite of Passage' in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (Australian National University Press, 2010) 37, 41-2.

<sup>814</sup> Paula Maatta, *Equal Pay: Just a Principle of the ILO?* (Books on Demand, 2008) 304.

<sup>815</sup> In the area of education, the number of women at the secondary level has increased over time to a point where women are represented at a higher level than their male counterparts. Moreover, the number of women undertaking a masters or doctoral degree almost equals the number of men who pursue higher education courses. Nevertheless, women are still underrepresented in 'traditional male areas of study' like information technology or engineering. United Nations, Convention on the Elimination of All Forms of Discrimination against Women (*CEDAW*), Committee on the Elimination of Discrimination against Women, Thirty-fourth session, *Summary Record of the 715<sup>th</sup> Meeting – Consideration of Reports Submitted by State Parties under Article 18 of the Convention – Combined Fourth and Fifth Periodic Report of Australia* (9 February 2006) 2; in the area of employment the number of women has increased from 40% in 1979 to 53% in 2004. Australian Bureau of Statistics, *Australian Social Trends 2006 – Trends in Women's Employment – Changes in Employment from 1979 to 2004 in all Age Groups* (online) 25  
October 2011  
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/858badad39afb98dca2571b000153d73!OpenDocument>>.

Australia's international treaty obligations under *CERD* and *CEDAW* have been realised with the implementation of the *RDA 1975* and the *SDA 1984*.<sup>816</sup> The *RDA 1975* and the *SDA 1984* both contain the allowance of special measures.<sup>817</sup> However, not many Australian employers 'have been prepared to initiate Affirmative Action programs voluntarily' due to a common misunderstanding that jobs would have to be allocated 'by virtue of sex or race alone' instead of using the merit principle of the most deserving job applicant.<sup>818</sup> Therefore, the application of special measures in Australia has been a slow process, which is characterised by a general distrust of special measures, especially if they are 'hard' measures like quotas.<sup>819</sup> The situation is similar in the United States and Canada, where quotas have only been accepted in rare cases of extreme racial or gender discrimination.<sup>820</sup>

In 2010, *CERD* officials noted gaps in 'legal and constitutional protections' against racial discrimination based on the absence of 'any entrenched protection against racial discrimination' in the *Australian Constitution*.<sup>821</sup> It was suggested that measures should be taken to ensure the *RDA 1975* will not be weakened by a necessary legal harmonisation.<sup>822</sup> The fact that there is no federal legislation that 'comprehensively protects human rights' in Australia,<sup>823</sup> and the description of

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<sup>816</sup> Even though, Australia is party to *CEDAW*, it has made considerable reservations to the content of this international treaty. These reservations include Australia's hesitation to guarantee paid maternity leave and to accept women in direct combat roles. United Nations, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, Committee on the Elimination of Discrimination against Women, Thirty-fourth session, *Summary Record of the 715<sup>th</sup> Meeting – Consideration of Reports Submitted by State Parties under Article 18 of the Convention – Combined Fourth and Fifth Periodic Report of Australia* (9 February 2006) 3. However, employees in Australia 'with 12 months of continuous service' are entitled 'to a minimum of 52 weeks of shared unpaid parental leave following the birth of a child. Recent data also showed that 45 per cent of female employees were given paid maternity leave by their employer': at 3.

<sup>817</sup> The *Racial Discrimination Act 1975 (Cth)* allows for special measures in section 8(1), and the *Sex Discrimination Act 1984 (Cth)* allows for them under section 7D.

<sup>818</sup> Margaret Thornton, 'Affirmative Action, Merit and Police Recruitment' (2003) 28 (5) *Alternative Law Journal* 235.

<sup>819</sup> *Ibid.*

<sup>820</sup> *Ibid* 236. See also Chapters 4 and 5 of this thesis.

<sup>821</sup> United Nations, *CERD*, Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination Australia (13 September 2010) 2.

<sup>822</sup> *Ibid.*

<sup>823</sup> NGO Steering Group, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on the Elimination of Racial Discrimination – Australia* (June 2010) 2. In 2009, a 'national consultation was held on the protection and promotion of human rights in Australia (the National Human Rights Consultation),' which recommended the adoption of a Human Rights

its legal system in regards to the protection of human rights ‘as a relatively “rights-free-zone” remains both institutionally and culturally’ relevant.<sup>824</sup>

In 2010, *CEDAW* officials welcomed the historic milestone that two women occupy two of the highest public offices – namely Ms. Quentin Bryce as Australia’s first female Governor-General and Ms. Julia Gillard as Australia’s first female Prime Minister.<sup>825</sup> However, *CEDAW* officials also noted with concern that the under-representation of women in ‘leadership and decision-making positions’ in all areas of life remain a fact, which should be addressed by the implementation of temporary special measures, for example, in employment.<sup>826</sup>

The observations of *CEDAW* officials are based on the Australian Human Rights Commission which stated in 2010 that ‘despite making up 45% of Australia’s total workforce, women remain grossly under-represented in leadership and management positions in virtually all sectors’, and recommended that temporary special measures should be taken to address these issues by using, for example, ‘mandatory gender diversity quotas’ of 40% ‘within a specified timeframe’ for publicly listed large employers.<sup>827</sup> In comparison with the United States and Canada, Australia has the ‘lowest percentage of women on boards and Executive Key Management Personnel’.<sup>828</sup> The Global Gender Gap Index, which evaluates the gap between men and women with regard to ‘economic participation and opportunity, educational attainment, health and survival and political

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Act. Even though, this proposal was rejected by the Australian Government in April 2010, a new ‘framework for the protection of human rights in Australia, which contains some significant commitments to strengthen’ these rights have been introduced: at 2.

<sup>824</sup> Sylvia Arzey and Luke McNamara, ‘Invoking International Human Rights Law in a “Rights-Free-Zone”’: Indigenous Justice Campaigns in Australia’ (John Hopkins University Press, 2011) 33 *Human Rights Quarterly* 737.

<sup>825</sup> United Nations, *CEDAW*, Committee on the Elimination of All Forms of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women Australia* (30 July 2010) 2.

<sup>826</sup> *Ibid* 4-5.

<sup>827</sup> Australian Human Rights Commission, *Australia’s Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – Independent Report to the Committee on the Elimination of Discrimination against Women* (5 July 2010) 18.

<sup>828</sup> Australian Government, Equal Opportunity for Women in the Workplace Agency, *EOWA 2010 Census Key Findings Report* (2010) 3.

empowerment' ranked Australia on place 23 amongst 200 countries worldwide.<sup>829</sup> Canada was ranked 20<sup>th</sup>, and the United States 19<sup>th</sup>.<sup>830</sup>

Moreover, in 2010 *CEDAW* officials urged Australia to address the persistent pay gap between men and women in employment.<sup>831</sup> The main issue of discrimination against women in the workforce in Australia is the disparity in wages between men and women. The pay gap between men and women is an average rate of 17.2 per cent, which is similar to the gap 25 years ago.<sup>832</sup> The gap means that women 'retire with less than half the amount in their superannuation accounts compared with men and are two and a half times more likely than men to live in poverty in their old age'.<sup>833</sup>

In the context of *CERD* and *CEDAW*, the chapter investigates the main Acts of the Federal Parliament that allow for the implementation of affirmative action policies, including the *RDA 1975*, the *SDA 1984*, and the *Workplace Gender Equality Act 2012* (Cth) as well as guidelines at the executive level regarding the implementation of affirmative action and its limits. The term 'special measures' is the term commonly used in Australian law to describe affirmative action policies.

## II. NEUTRAL CONSTITUTIONAL APPROACH

Australia is a country that can be regarded as pursuing a neutral approach towards affirmative action within its constitutional framework. Unlike the *Constitutions* of the United States and Canada, the *Australian Constitution* does

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<sup>829</sup> Ricardo Hausmann, Laura D Tyson and Saadia Zahidi, World Economic Forum, *The Global Gender Report 2010* (2010) 4, 6.

<sup>830</sup> Ibid 8, 62, 98, 306; the country ranked 1<sup>st</sup> by the Global Gender Report 2010 is Iceland followed by Norway on 2<sup>nd</sup> place and Finland on 3<sup>rd</sup> place: at 8.

<sup>831</sup> United Nations, *CEDAW*, above n 865, 7.

<sup>832</sup> Susan Magarey, 'To Demand Equality is to Lack Ambition: Sex Discrimination Legislation – Contexts and Contradictions' in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (Australian National University Press, 2010) 100; The Australian Bureau of Statistics figures reveal that the average gender pay gap is 17.2% in 2011.

<sup>833</sup> Ibid 100.

not contain a Bill of Rights or Charter of Rights to outline the rights of its citizens.<sup>834</sup> The *Australian Constitution* ‘is an instrument which simply provides for a framework of government’.<sup>835</sup>

The *Australian Constitution* does not contain an equality clause that could be interpreted as allowing affirmative action. Nevertheless, the idea of an implied right to equality in the *Australian Constitution* was explored in *Leeth v Commonwealth (Leeth)*.<sup>836</sup> In *Leeth*, the High Court of Australia dealt with a federal provision that ordered the application of state and territory parole legislation to federal prisoners in accordance to the state or territory they had been convicted in. These different jurisdictions applied different non-parole sentences (minimum sentences) for the same federal offences, which led to an unequal sentencing for the same crimes across Australia.<sup>837</sup> Justices Deane and Toohey suggested that the *Australian Constitution* could be interpreted as implying a legal right to equality. This suggestion was based on their view that the federal provision in question ‘discriminated in a way which was inconsistent with the doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts’.<sup>838</sup>

Although Deane and Toohey JJ stated that there is no explicit mention of a ‘general doctrine of legal equality’ in the *Australian Constitution*,<sup>839</sup> they suggested that the framers of the *Constitution* had entrenched such a principle of equality within the *Constitution*.<sup>840</sup> Their view was based on the existence of various common law doctrines, for example, the ‘separation of judicial power from legislative and executive powers and the vesting of judicial power in

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<sup>834</sup> The idea of a Bill of Rights in Australia faces multiple concerns, for example, that it would interfere with the federal balance that courts would be placed over the Commonwealth and the State Parliaments, and that society would get litigious. Bede Harris, *A New Constitution for Australia* (Taylor & Francis, 2002) 11-6; Nevertheless, some rights of citizen are mentioned in the Australian Constitution, for example, ‘acquisition of property on just terms (s 51(xxxi)), trial on indictment by jury (s 80), and the freedom of religion (s 116)’. The Hon Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Robert French et al (eds), *Reflections on the Australian Constitution* (The Federation Press, 2003) 9.

<sup>835</sup> *Ibid* 8.

<sup>836</sup> (1992) 174 CLR 455.

<sup>837</sup> *Ibid*.

<sup>838</sup> *Ibid* 455-6; See also Jeremy Kirk, ‘Constitutional Implications (II): Doctrines of Equality and Democracy’ (2001) 25 *Melbourne University Law Review* 24-5.

<sup>839</sup> *Leeth* (1992) 174 CLR 455, 456.

<sup>840</sup> *Ibid*, see also Kirk, above n 838, 31.



designated courts’, which have the duty to treat everybody ‘fairly and impartially as equals before the law and [have] to refrain from discrimination on irrelevant or irrational grounds’.<sup>841</sup> Moreover, Deane and Toohey JJ claimed that several provisions of the *Australian Constitution* reflect indirectly the idea of legal doctrine of equality, including sections 86, 88, 90, which provide a ‘guarantee against discrimination between persons in different parts of the country in relation to customs and excise duties’.<sup>842</sup> Deane and Toohey JJ’s position of an implied right to legal equality in the *Australian Constitution* can be regarded as progressive in terms of human rights, but it was neither followed by the majority in *Leeth*<sup>843</sup> nor by any other courts in the legal history of Australia.<sup>844</sup> Without such an implied equality clause in the *Australian Constitution*, it is impossible to construct an indirect allowance of affirmative action which could have been based on such an equality clause. As a result, the way affirmative action has been constitutionally justified in the United States cannot be applied similarly in Australia.

However, the absence of an equality clause or implied doctrine of equality in the *Australian Constitution* could prove beneficial for the allowance of affirmative action under a different viewpoint. Instead of trying to base the allowance of affirmative action on the idea of implied substantive equality in the *Australian Constitution*, the absence of the requirement of constitutional equality could

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<sup>841</sup> *Leeth* (1992) 174 CLR 455, 486, 487.

<sup>842</sup> More specific provisions of the *Australian Constitution* that are mentioned by Justices Deane and Toohey are ‘the guarantee that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof (s 99); the guarantee of freedom of interstate trade, commerce and intercourse (s 92); the guarantee of direct suffrage and equality of voting rights amongst those qualified to vote (ss 24, 25); the guarantee that no religious test shall be required as a qualification for any office or public trust under the Commonwealth (s 116)’; and section 117, which states that a ‘subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State’. *Leeth* (1992) 174 CLR 455, 487.

<sup>843</sup> The opinions of Justices Deane and Toohey were not followed by the other justices of the High Court in *Leeth*. Justices Mason C J, Brennan, Dawson and McHugh decided that the federal provision in question was valid, whilst Justices Deane, Toohey and Gaudron dissented. Therefore, ‘the minimum term of imprisonment imposed on a federal offender may vary significantly according to the State in which he is tried.’ *Leeth* (1992) 174 CLR 455, 456.

<sup>844</sup> The idea of an implied doctrine of legal equality in the *Australian Constitution* was further rejected in *Kruger v Commonwealth* (1997) 190 CLR 1; the majority of the Court held that ‘[t]here is no constitutional requirement that all laws of the Commonwealth must accord equality before the law’: at 3.

prove beneficial in terms of avoiding constitutional barriers to the allowance of affirmative action as have been encountered in the United States.

Without an equality clause, the application of affirmative action does not violate the *Constitution* on grounds of discriminating negatively against non-beneficiaries of affirmative action. Indeed, a majority of the Court affirmed that section 51(xxvi) of the *Constitution*, the race power, can be used to implement laws which expressly discriminate against persons on the basis of their race.<sup>845</sup> In Australia, the absence of constitutional protection of equality renders the distinction between formal and substantive unimportant from a constitutional perspective. In the end, the absence of an equality clause or implied doctrine of equality in the *Australian Constitution* neither constitutes a basis nor a barrier for the allowance of affirmative action.<sup>846</sup>

Affirmative action targeting racial discrimination could be regarded as constitutionally justifiable through the ‘race power clause’ of the *Australian Constitution*. Section 51(xxvi) of the *Australian Constitution*, the race power, empowers the Federal Parliament to enact laws for people of certain races, if it appears to be ‘necessary to make such special laws’.<sup>847</sup> This power was originally included in the *Constitution* to confine ‘people of any alien race’ to certain areas and occupations and to limit their immigration.<sup>848</sup> In addition, the purpose of the race power has been described as ‘giving such people special protection and securing their return’ to their home countries.<sup>849</sup> Originally, the race power did not refer to indigenous people in Australia, and until 1967 they

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<sup>845</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>846</sup> However, Australia has still to adhere to the international treaty *CERD* and the *Australian Constitution* has to be interpreted in the light of *CERD*. This issue will be discussed further in Chapter 7 part VI of this thesis.

<sup>847</sup> *Australian Constitution*, s51(xxvi). This ‘race power’ clause states that ‘the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) the people of any race, for whom it is deemed necessary to make special laws’.

<sup>848</sup> Chief Justice Robert French, ‘Protecting Human Rights without a Bill of Rights’ (2010) 43 *John Marshall Law Review* 773-4; Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 622.

<sup>849</sup> *Ibid.*

were expressly excluded from its coverage so that states could retain' their legislative power over them.<sup>850</sup>

The race power clause has raised international concern about its 'inherently discriminatory' nature, and Australian courts have not decided upon 'the limits of allowable discrimination' of this constitutional power.<sup>851</sup> The most recent case involving the race power is *Kartinyeri v Commonwealth (Kartinyeri)*.<sup>852</sup> In *Kartinyeri*, Aboriginal Australians of the Ngarrindjeri tribe claimed that the *Hindmarsh Island Bridge Act 1997 (Cth) (Bridge Act)* was invalid, because it detrimentally affected their right to apply for a declaration that protects certain areas under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*.<sup>853</sup> The *Bridge Act* was perceived as restricting the rights of the Ngarrindjeri people, and the Court had to decide whether the *Bridge Act* could be regarded as a special law under the race power clause of the *Australian Constitution*.

The majority of the Court held the Bridge Act to be valid under the race power. In dissent, Justice Kirby concluded that even though the race power clause permits the establishment of special laws, in the late 20<sup>th</sup> century it could only be used to discriminate positively on the basis of race.<sup>854</sup> Justice Gaudron also held that the power to pass discriminatory laws under the race power was limited, though Gaudron joined with the majority in holding the Bridge Act to be valid. Gaudron stressed the importance of Parliament demonstrating that the racial group subject to the discriminatory law was in need of special treatment as a criteria for validity. Although it was for Parliament to determine the existence of

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<sup>850</sup> Chief Justice Robert French, 'Protecting Human Rights without a Bill of Rights' (2010) 43 *John Marshall Law Review* 774. The 'race power' clause is section 51(xxvi) of the Constitution, which states that 'the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws'. The part 'other than the aboriginal race in any State' was removed in 1967.

<sup>851</sup> Michael Legg, 'Indigenous People and International Law: Racial Discrimination, Genocide and Reparations (2002) 20 *Berkeley Journal of International Law* 426, 397.

<sup>852</sup> *Kartinyeri* (1998) 195 CLR 337.

<sup>853</sup> *Ibid.*

<sup>854</sup> *Ibid* 337, 417.

this need, the conclusion of Parliament on this issue is subject to review by the Court.<sup>855</sup>

Whatever is the state of the law with respect to detrimental special laws, the Court clearly affirmed that Parliament has the power under the race power to pass laws which are beneficial for the racial group involved. Therefore, the race power in the *Australian Constitution* is clearly capable of supporting affirmative action laws that target persons on the basis of their race.

To date, special laws have only been passed in relation to Indigenous Australians, for example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), and the *Native Title Act 1993* (Cth).<sup>856</sup> Also, the *RDA 1975*, which allows the application of affirmative action, was believed to be a special law under the race power of the *Constitution*.<sup>857</sup> In *Koowarta v Bjelke-Peterson (Koowarta)* the Court investigated the relation between the race power and the *RDA 1975*.<sup>858</sup> It was argued that the *RDA 1975* could not be regarded as a special law under the race power of the *Constitution*, because it applies equally to all races and thus cannot be a ‘special law for the people of any one race’.<sup>859</sup> The *RDA 1975* was perceived as a law that had been implemented to fulfil Australia’s treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>860</sup> Therefore, the Court in *Koowarta* regarded the *RDA 1975* as a law under section 51(xxix) of the *Constitution*, the ‘external affairs’ power, rather than under the race power.<sup>861</sup> Since *Koowarta*, the external affairs power has been the basis for laws on any subject matter that implement international treaty obligations. The *SDA 1984* and the *RDA 1975* all rely on the external affairs power for their validity. Furthermore, they are only valid to the

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<sup>855</sup> Ibid 365-6.

<sup>856</sup> Other special laws under the race power are the *Native Title Amendment Act 1998* (Cth) and the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

<sup>857</sup> In *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, it was debated whether or not the *Racial Discrimination Act 1975* (Cth) was valid under the race power of the *Constitution*.

<sup>858</sup> (1982) 153 CLR 168.

<sup>859</sup> *Koowarta* (1982) 153 CLR 168-9.

<sup>860</sup> Ibid.

<sup>861</sup> Ibid.

extent to which they implement treaty obligations under CERD and CEDAW and other international treaties. In relation to affirmative action, then, the Australian law cannot implement affirmative action policies beyond the limits incorporated in these international treaties.

### ***A. High Court Cases and Limits for Affirmative Action***

There has only been one High Court case to consider specifically the requirement that special measures be temporary, *Gerhardy v Brown*.<sup>862</sup> Even though, *Gerhardy* does not involve affirmative action in employment matters, the Court considered the legal requirements for limiting special measures, which are relevant to the implementation of special measures in employment in Australia.

#### **1. *Gerhardy v Brown***<sup>863</sup>

Section 19 of the *Pitjantjatjara Land Rights Act 1981* (SA) (*PLRA*) required non-Pitjantjatjara persons to seek permission to enter Pitjantjatjara land. The question in *Gerhardy* was whether s 19 could be regarded as a special measure under the *RDA 1975*.<sup>864</sup> The exclusion of non-Pitjantjatjara peoples by the *PLRA* was based on race, and therefore was unlawful under the *RDA 1975* unless it constituted a special measure under section 8(1).<sup>865</sup>

The High Court concluded that it was a special measure. The Court's conclusion was reached through an interpretation of special measures in Article 1(4) and 2(2) of *CERD*. Article 1(4) of *CERD* states that special measures are not deemed racial discrimination if their purpose is the 'adequate advancement of certain racial or ethnic groups or individuals', who may require such protection in order to ensure their 'human rights and fundamental freedoms'.<sup>866</sup> Nevertheless, Article 1(4) also points out that special measures should not 'lead to the maintenance of separate rights for different racial groups', and that they should

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<sup>862</sup> (1985) 159 CLR 70.

<sup>863</sup> *Ibid.*

<sup>864</sup> *Ibid.*

<sup>865</sup> *Ibid.*

<sup>866</sup> *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), article 1(4).

not be ‘continued after the objectives for which they were taken have been achieved’.<sup>867</sup> Article 2(2) *CERD* reinforces the temporary nature of special measures.

To find section 19 valid, the Court reflected on the requirement of temporariness of the special measures. Justice Mason perceived the *Pitjantjatjara Land Rights Act 1981* (SA) as having an ‘air of permanence’ about it due to its purpose of preserv[ing] and protect[ing] the culture of the Pitjantjatjara peoples’. Protection of culture was understood as an on-going concern, rather than a temporary one.<sup>868</sup> Justice Mason did not, however, exclude the Act as a special measure, but stated that:

It [the Act] may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso [Article 1(4) *CERD*]. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place. That the State Act is expressed to operate indefinitely is not a problem. It would be impracticable for the legislation to specify a terminal point in the operation of the regime which it introduces. It is sufficient to say that, if and in so far as the validity of the State Act depends on its fitting the character of special measures within Art. 1.4 of the Convention its validity would come in question once the proviso to the article ceases to be satisfied.<sup>869</sup>

Justice Brennan also held that the permanent character of the *PLRA* was not an obstacle for its characterization as a special measure. Brennan further outlined the impossibility of determining ‘in advance when the objectives of a special measure will be achieved’.<sup>870</sup> Furthermore, Brennan J claimed that Article 1(4) *CERD* did not require ‘the time for the operation of special measures to be defined before the objectives of the special measures have been achieved’.<sup>871</sup> If time reveals that the special measure has fulfilled its purpose, in the case of *Gerhardy v Brown* the ‘effective and genuine equality’ of Pitjantjatjara peoples,

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<sup>867</sup> *Ibid.*

<sup>868</sup> *Gerhardy* (1985) 159 CLR 106.

<sup>869</sup> *Ibid.*

<sup>870</sup> *Ibid* 140.

<sup>871</sup> *Ibid.*

the Act would have to be terminated in order to comply with the temporary nature of special measures under *CERD*<sup>872</sup>. However, the Court did not specify how it can be determined when the purpose of a special measure has been achieved, but it recommended close monitoring processes to assess the progress of special measures.<sup>873</sup>

Overall, the exclusion of non-indigenous people from the land involved was seen as justified, because the court held that:

‘indigenous people may require special protection as a group because of their lack of education, customs, values and weaknesses, particularly if they are a minority, [which] may lead to an inability to defend and promote their own interests in transactions with the members of the dominant society’.<sup>874</sup>

The High Court of Australia rejected the notion of the necessity of an explicit deadline for temporary special measures, but recommended monitoring processes in order to assess when a special measure has achieved its purpose and therefore would have to be discontinued.

The High Court of Australia was correct to point out in *Gerhardy* that *CERD* does not require a deadline for a special measure to be set in advance.<sup>875</sup> This could imply that special measures cannot only be short-term measures, but also long-term measures whose ‘objectives may be incapable of being achieved in the near future, or they may be never attainable at all, thus justifying the indefinite validity of special measures’.<sup>876</sup>

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<sup>872</sup> Ibid 140-1.

<sup>873</sup> Ibid.

<sup>874</sup> Legg, above n 851, 399. See also *Gerhardy* (1985) 159 CLR 105.

<sup>875</sup> Another case in which the *Racial Discrimination Act 1975* (Cth) was investigated by the High Court is *Mabo v Queensland (1988) 166 CLR 186 (Mabo No 1)*. Whilst the Court investigated in *Gerhardy v Brown* who could access Aboriginal lands, in *Mabo No 1* the Court had to decide who could occupy these lands. The Court in *Mabo No 1* had to decide whether the *Queensland Coast Islands Declaratory Act 1985* (QLD), which extinguished indigenous land rights, was valid under the *RDA 1975* (Cth). The Court decided that the Queensland law was invalid, because it was inconsistent with a federal law (*RDA 1975*). (Section 109 of the *Constitution* requires that if inconsistencies occur between a state and a Commonwealth law, the federal law prevails in regards to the inconsistencies). Both High Court decisions – *Gerhardy v Brown* and *Mabo No 1* – ‘have demonstrated that the *Racial Discrimination Act 1975* (Cth) limits the operation of State laws both where the laws confer rights on Aborigines and where they deprive Aborigines of rights’. Nicola Nygh, ‘Implications of Recent High Court Decisions for State Laws Dealing with Aborigines and Aboriginal Land: *Gerhardy v Brown* and *Mabo v Queensland*’ (1990) 1 (4) *Public Law Review* 329.

<sup>876</sup> Wojciech Sadurski, ‘*Gerhardy v Brown* v the Concept of Discrimination: Reflections on the Landmark Case that wasn’t’ (March 1986) 11 *Sydney Law Review* 25.

*Gerhardy v Brown* deals with an entire land rights act as an affirmative action measure concerning indigenous people. This context differs to affirmative action in employment in ways that need to be considered in order to determine if the findings of *Gerhardy v Brown* can be applied in the different context of discrimination in employment for women and minorities. First, indigenous people enjoy a special status in society due to historical discrimination that deprived them from their land and culture, which contributes to their economic difficulties and social status today.<sup>877</sup> Second, the special measure in *Gerhardy* was not aimed at redressing discrimination in a field of endeavour where all should be treated equally. It involved an issue arising on Indigenous land, and involved the protection of Indigenous culture.

Therefore, it may not be possible to apply the considerations in relation to the declaration of the special measure in *Gerhardy* to employment matters. Nonetheless, the way the Court described the assessment of the end point for the special measure is instructive. The core principle expressed by the Court is that a measure remains a special measure without a definite end point if its affect is properly monitored. Furthermore, as the Canadian example shows, it is possible to set targets and time limits as part of the monitoring process in employment in a way that the High Court found impractical in relation to the protection of Indigenous land and cultural rights. If the conclusion about the proper application of special measures by the High Court in *Gerhardy v Brown* is applied to employment matters, it seems that affirmative action in employment could be justified without the explicit setting of a deadline to it. The only requirement for the validity of the affirmative action measure would be an explicit or implied intention to terminate the measure as soon as it can be proven that its purpose has been achieved.

Affirmative action in employment without explicit temporal limits would be based on the idea that it is impossible to set limits in advance, because the success of these measures in the future cannot be predicted in an exact manner. Whilst temporal limits to a land rights act that aims at the protection of

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<sup>877</sup> Although indigenous people represent a minority in Australia, there are many different tribes that constitute indigenous people. This thesis acknowledges the different tribes, but refers to single tribes and all tribes as a whole by using the term 'indigenous people'.



indigenous people might be set in a broad manner based on the impossibility to predict when a disadvantaged indigenous tribe will be equal to the majority of a society in the future, temporal limits to specific affirmative action measures in employment could be set more precisely. Discriminatory situations in employment can be targeted by specific affirmative action measures that outline a goal and time limit. For example, a business that employs mainly male employees without being able to justify this situation on grounds of business necessity, could be given a numerical goal and time limit in relation to enhance the numbers of its female staff through affirmative action. Depending on the availability of female employees in the relevant employment category, it can be estimated when these goals will be achieved approximately. Hence, the difference between setting temporal limits to a land rights act and a specific affirmative action measure in employment is the predictability of its success in the future.

### III. ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION

Australia started implementing anti-discrimination legislation in the 1970s within its jurisdiction on Federal, State and Territory levels.<sup>878</sup> These anti-discrimination laws can cover different grounds and contain different exceptions.<sup>879</sup> However, nationally applied federal anti-discrimination laws can be used as a benchmark for state and territory anti-discrimination legislation regarding its underlying principles.<sup>880</sup> Therefore, the focus of this analysis is on anti-discrimination laws at the federal level in regards to the implementation of temporary special measures. The most important federal anti-discrimination legislation in regards to racial and gender discrimination in Australia have been implemented in order to satisfy Australia's treaty obligations under *CERD*, and

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<sup>878</sup> Peter Bailey and Annemarie Devereux, 'The Operation of Anti-Discrimination Laws in Australia' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (The Federation Press, 1998) 292.

<sup>879</sup> Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (The Federation Press, 4th ed, 2012) 2.

<sup>880</sup> *Ibid.*

*CEDAW*.<sup>881</sup> Australia has implemented a ‘comprehensive range of social, economic, political and legal frameworks’ in order to further the advance of the status of women and to eliminate gender and racial discrimination.<sup>882</sup> The most important federal anti-discrimination legislation regarding race and gender in Australia consists of the *RDA 1975*, and the *SDA 1984*,<sup>883</sup> and the *Workplace Gender Equality Act 2012 (Cth)*.<sup>884</sup>

### **A. Racial Discrimination Act 1975 (Cth)**

As a member of CERD, Australia is required to meet its obligations under this international treaty, which are ‘primarily incorporated into Australian law through the *Racial Discrimination Act 1975 (Cth)*’.<sup>885</sup> However, the *RDA 1975* neither requires the ‘Australian Government or its agencies [to] take positive steps to promote equality in the provision of public services’, nor does it ‘require “special measures” to accord with the definition of “special measures” in General Recommendation No. 32’.<sup>886</sup>

When the first racial discrimination bill was introduced into federal parliament on the 21 November 1973, the Attorney-General Lionel Murphy stated that:

‘the most blatant example of racial discrimination in Australia is that which affects Aboriginals ... There are still remnants of legislative provisions of the

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<sup>881</sup> Australia is party to *CEDAW*, which was signed by Australia in July 1980 and ratified in July 1983. United Nations, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by State Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Combined Fourth and Fifth Periodic Reports of State Parties - Australia* (3 February 2004) 11; Australia is also party to *CERD*, which was adopted on 21 December 1965 and entered into force on 4 January 1969. Australia signed *CERD* on the 13 October 1966 and ratified it on 30 September 1975. International Convention on the Elimination of All Forms of Racial Discrimination (1969); *Racial Discrimination Act 1975 (Cth)* Introduction.

<sup>882</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, (3 February 2004) above n 75, 13.

<sup>883</sup> Other important legislation regarding race in Australia are the *Racial Hatred Act 1995 (Cth)* and the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

<sup>884</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, (3 February 2004) above n 75, 13.

<sup>885</sup> NGO Steering Group, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on the Elimination of Racial Discrimination – Australia* (June 2010) 3; moreover there ‘is also anti-discrimination legislation in each state and territory that provides protection from racial discrimination’: at 3.

<sup>886</sup> *Ibid* 9.

paternalistic type based implicitly on the alleged superiority of the white race in which it is assumed that Aboriginals are unable to manage their own personal affairs and property. Discrimination affects Aborigines so far as it concerns the administration of the criminal law and the enjoyment of civil, political, social and economic rights ... It is clear that past wrongs must be put right so far as the Aboriginal population is concerned and that special measures must be provided'.<sup>887</sup>

Special measures, such as affirmative action, can be allowed under the *RDA 1975* in order to pursue substantive equality between the majority group and disadvantaged minority groups of society.<sup>888</sup> The implementation of special and concrete measures within the jurisdiction of Australia is perceived as mandatory according to article 2 paragraph 2 *CERD*, which includes a broad temporary limitation on these special measures (like article 1 (4) *CERD*)<sup>889</sup> stating that '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'.<sup>890</sup> This broad temporary limitation for special measures is firstly mentioned in article 1 (4) *CERD* which states that 'special measures ... do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'. Hence, given that the *RDA 1975* is based on *CERD*, it can be implied that the *RDA 1975*

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<sup>887</sup> John Henry Chesterman and Brian Galligan, *Citizens Without Rights – Aborigines and Australian Citizenship* (1997, Cambridge University Press) 196.

<sup>888</sup> Anne-Marie Mooney Cotter, *Race Matters: an International Legal Analysis of Race Discrimination* (2006) 74; The Preamble of the *RDA* outlines its special status by stating that '... AND WHEREAS, it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention ...'

<sup>889</sup> Article 1 (4) *CERD* states that 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

<sup>890</sup> Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005) 209; Article 2 paragraph 2 *CERD* states that 'States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

entails the allowance for special measures (like affirmative action policies) and some kind of limitations on them.

Section 8 of the *RDA 1975* states that the prohibition of racial discrimination ‘does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention [*CERD*] applies’.<sup>891</sup> This exception from racial discrimination could be regarded as meaning that ‘formal equality may be diminished or avoided to achieve effective and genuine equality [substantive equality]’.<sup>892</sup> This section reveals that even though special measures are perceived as lawful, they only represent an exception to the rule, which means without such an exclusionary clause, they would be perceived as discriminatory and therefore unlawful. Special measures are not regarded as unlawful discrimination by the *RDA 1975*, but find their limitations in sections 8(1) and 19 (3) of the Act.<sup>893</sup>

Section 8(1) of the *RDA 1975* exempts special measures from being unlawful by referring to article 1(4) *CERD*. It includes a requirement that special measures be temporary. Sections 9 and 10 of the *RDA 1975* relate directly to Article 5 of *CERD*, which prohibits racial discrimination and provides a long list of guaranteed rights for everyone regardless of race.<sup>894</sup> Section 9 (2) of the *RDA 1975* declares racial discrimination to be unlawful, and refers to ‘a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life’ in relation to Article 5 of *CERD*. Section 10 (2) of the *RDA 1975* guarantees rights to equality before the law and refers more generally to ‘rights of a kind referred to in Article 5 of the Convention [*CERD*]’.<sup>895</sup> Altogether, these sections of the *RDA 1975* reflect the spirit of Article 5 of *CERD* and are designed in its image.<sup>896</sup>

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<sup>891</sup> *Racial Discrimination Act 1975* (Cth) s 8(1).

<sup>892</sup> Legg, above n 851, 398.

<sup>893</sup> Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975 – Background Paper No 1* (2007) 44; *Racial Discrimination Act 1975* (Cth) ss 8(1), 10(3).

<sup>894</sup> The Article 5 CERD provides a list of guaranteed rights regarding 21 different issues from equal treatment to civil rights.

<sup>895</sup> *Racial Discrimination Act* ss 9-10.

<sup>896</sup> Legg, above n 851, 398.

Subsections 10 (1)<sup>897</sup> and 10 (3) of the *RDA 1975*,<sup>898</sup> which are about rights to equality before the law, are the only possible regulations that special measures can be applied to. Section 10 protects people of different race, colour or national or ethnic origin from limited enjoyment of rights through discriminatory laws. Therefore, section 10 of the *RDA 1975* can be seen as a unique ‘equal protection clause’ in Australian anti-discrimination legislation, which aims to rewrite laws that contain racially motivated discriminatory elements.<sup>899</sup> Furthermore, section 10 (3) of the *RDA 1975* protects certain property and land matters of Aboriginal and Torres Strait Islander peoples.<sup>900</sup>

Even though the *RDA 1975* is based on CERD, which contains broad temporary limits for special measures, the *RDA 1975* itself offers only a rather confined area of application for special measures, and no regulations to outline the temporary nature of special measures in the form of short-term or long-term goals. *CERD* does not only require temporary limits, but also emphasises that

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<sup>897</sup> Subsection 10 (1) of the RDA states that ‘If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin’.

<sup>898</sup> Subsection 10 (3) of the RDA states that ‘Where a law contains a provision that: (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person’.

<sup>899</sup> Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law – Text, Cases and Materials* (The Federation Press, 2008) 200-1.

<sup>900</sup> Special measures in relation to land rights gained centre stage when the question arose whether or not ‘the land provisions of the Pitjantjatjara Land Rights Act 1978 (SA) were racially discriminatory under the Commonwealth Act [Racial Discrimination Act 1975] and the Convention [ICERD]. Their effect was to prevent any person other than Pitjantjatjara (or a police officer, etc., in the course of official duties) entering the Pitjantjatjara land in the north-west of South Australia without a permit from the corporate body of the Pitjantjatjara. The High Court held unanimously that there was no conflict between the South Australian provisions and the Commonwealth Act, on the ground that the South Australian Act (including its permit provisions) was a ‘special measure’ within the meaning of Article 1 (4) of the Convention and s. 8 (1) of the Act. However, five of the seven judges (Wilson & Dawson JJ not deciding) held that, in the absence of Article 1 (4), the provisions would have been discriminatory, because they made a distinction between Pitjantjatjara and non- Pitjantjatjara, one element of which was the proposition that to be a Pitjantjatjara was to be a member of a race’. James Crawford, *The Rights of Peoples* (Oxford University Press, 2001) 8-9.

special measures can only be taken for the ‘sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals’ in order to achieve ‘equal enjoyment or exercise of human rights and fundamental freedoms’ for all.<sup>901</sup> These goals are all meant to be beneficial for the groups involved, and can be interpreted as constituting another limitation to special measures. Hence, a special measure would have to be beneficial for the racial or ethnic group involved, or it would not count as a special measure under *CERD*.

As a consequence, a special measure under section 8(1) *RDA 1975* would also have to be beneficial in order to count as a special measure, because this section of the *RDA 1975* refers directly to special measures under *CERD*, and in fact relies on *CERD* for its validity.<sup>902</sup> Of course, by suggesting that a special measure has to be beneficial, the question arises of what exactly can be considered as beneficial for a racial group. The Human Rights and Equal Opportunity Commission affirmed the importance of a beneficial outcome of a special measure in *Bligh v Queensland*,<sup>903</sup> in which it ruled that Queensland legislation that had been established for the advancement of Aborigines, but paid them less for equal work than white Australians, could not be accepted as a special measure, because it was not to the benefit of indigenous people.<sup>904</sup> The requirement of a beneficial outcome of special measures raises not only the question of what exactly can be considered as truly beneficial for the racial groups involved, but also leads to the question about the balance of detrimental and beneficial effects of such measures. It would have to be determined if all consequences of a special measure have to be beneficial, or if short-term detrimental effects could outweigh long-term beneficial results. For example, could the repeal of a certain human right for a racial group in order to support an overall beneficial goal be justified as a special measure? This question has been raised in Australia in relation to the Northern Territory Emergency Response Initiative, which has been regarded as controversial since its establishment.

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<sup>901</sup> *Convention on the Elimination of All Forms of Racial Discrimination* (*CERD*), article 1 (4).

<sup>902</sup> See also *Koowarta* 168-9.

<sup>903</sup> *Bligh, Coutts, Coutts, Foster, Lenoy, Sibley, Sibley and Palmer v Queensland* [1996] HREOCA 28 (24 September 1996).

<sup>904</sup> The Queensland legislation in question was the *Aborigines Act 1971* (QLD) and the *Aborigines Regulations 1972* (QLD). The complainants were compensated for their loss in wages and in damages for loss of self-respect: at 15.

## 1. *The Northern Territory Emergency Response*

The Northern Territory Emergency Response has been classified as a special measure (affirmative action) by the Australian Government under section 8(1) of the *RDA 1975*, but it has been controversial ever since due to its potentially detrimental effects on the target group involved.<sup>905</sup> The Northern Territory Emergency Response was enacted as a response to a government report called ‘Little Children are Sacred’, which focused on child abuse in Aboriginal communities of the Northern Territory and recommended to take immediate steps to help the situation.<sup>906</sup> Shortly after this report, a package of legislation was approved that also included the *Northern Territory National Emergency Response Act 2007 (NTER)*, which was decided upon without any prior consultations with the Aboriginal communities involved.<sup>907</sup> The *NTER* was meant to further the advancement of the Aboriginal communities involved by implementing measures which aim at the prevention of child abuse.

The measures taken by this emergency legislation have been regarded as beneficial for the Aboriginal groups involved, even though some Aboriginal rights have been limited by it, for example, the rights to ‘alcohol consumption or use of pornographic materials, as well as a number of limitations to vested communal rights’, which were regarded as possible triggers for child abuse.<sup>908</sup> The problem with this legislation has been its differential treatment of Aboriginal peoples from the rest of the Australian population by limiting only Aboriginal

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<sup>905</sup> Jonathon Hunyor, ‘Is it Time to Re-Think Special Measures under the Racial Discrimination Act? The Case of the Northern Territory Intervention’ (2009) 14 (2) *Australian Journal of Human Rights* 40.

<sup>906</sup> United Nations, Human Rights Council General Assembly, Fifteenth Session, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development - The Situation of Indigenous Peoples in Australia* (4 March 2010) 42; Other recommendations of the ‘Little Children are Sacred’ (Ampe Akelyernemane Meke Mekarle) report were related to ‘government leadership; family and children’s services; health crisis intervention; prosecutions and victim support; bail; offender rehabilitation; prevention services; health care as prevention of abuse; family support services; education; alcohol and substance abuse; community justice; employment; housing, pornography; gambling; and cross cultural practices’: at 42.

<sup>907</sup> The package of legislation included the ‘Social Security and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007; and the Families, Community Services and Indigenous Affairs and Other Legislation Amendment Act 2007’; see also United Nations, above n 906, 42.

<sup>908</sup> United Nations, above n 906, 43.

peoples' individual rights, which as a result amounts 'to discrimination prohibited under international and domestic legislation'.<sup>909</sup>

Whilst the whole of the *NTER* legislation has been criticized by *CERD* officials, some measures of the Act have been regarded as particularly discriminatory, for example, Section 31 of the *NTER* Act which enabled the Australian Government to acquire compulsory 5-year leases of Aboriginal land in order to improve the housing situation,<sup>910</sup> and Section 47 which gives the Government control over Aboriginal town camps.<sup>911</sup> Furthermore, *CERD* officials questioned the legality of an introduced compulsory income management regime 'that involves severe limitations on the use of social security benefits' by diverting 'fifty percent of individuals' income support and 100% of advances and lump sum payments' to a Government controlled "income management" account'.<sup>912</sup> Aboriginal people are only allowed to draw money from this account to buy daily necessities like 'food, clothing, and household items' in 'specially licensed stores' in order to prevent them from buying alcoholic beverages, which are deemed to further child abuse.<sup>913</sup> Therefore, even though the *NTER* legislation had been designed to help overcome 'immediate problems and improve the conditions of indigenous peoples' focusing especially on the welfare of women and children, its 'overtly interventionist' character has been regarded as discriminatory by international legal standards.<sup>914</sup>

*CERD* officials have assessed the 'special measures' of the *NTER* legislation and have concluded that they do not qualify as legally recognised special measures

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<sup>909</sup> Ibid. See also Hunyor, above n 905, 40.

<sup>910</sup> United Nations, Human Rights Council General Assembly, Fifteenth Session, above n 100, 45. These compulsory 5-year leases include 64 Aboriginal communities and guarantee the Commonwealth 'exclusive possession and quiet enjoyment of the land while the lease is in force. Such five-year leases came into effect at the entry of force of the *NTER*, without consultation or consent by the relevant Aboriginal associations. Further, these leases were acquired without any compensation to the indigenous owners': at 45.

<sup>911</sup> Ibid.

<sup>912</sup> Ibid 46.

<sup>913</sup> Ibid. This income management regime does not only apply to Aboriginal people with children, but to 'all those living in prescribed areas'. In addition, 'the *NTER* terminated the Community Development Employment Project (CDEP), under which the Commonwealth provided funding to employers to hire Aboriginal peoples who otherwise would have received unemployment support. Since termination of the CDEP, payments are now classified as unemployment payments, and are therefore subject to compulsory income management': at 46-7.

<sup>914</sup> Ibid 45.



allowed under *CERD*.<sup>915</sup> The reason for this lies in the character of these measures, which mainly impair the human rights of indigenous people in the communities involved, and do not treat them preferentially in order to balance historically entrenched disadvantages.<sup>916</sup> Even though, the *NTER* measures may have led to certain improvements, like an enhanced safety for Aboriginal women and children, ‘there is no evidence that the rights-impairing discriminatory aspects of the *NTER* have been necessary’.<sup>917</sup> However, there are differing views about the success of the *NTER*.<sup>918</sup>

Overall, the *NTER* legislation includes several racially discriminatory aspects, which are not compatible with Australia’s obligations under *CERD*.<sup>919</sup> In order to comply with the requirements for special measures under *CERD*, the *NTER* legislation must be ‘narrowly tailored, proportional, and strictly necessary to achieve the legitimate objectives being pursued’.<sup>920</sup> This means that a special measure has to be able to achieve its desired outcome, has to be in proportion to its cause, and that it would represent the best measure available to achieve the desired objective.

*CERD* officials claimed that the *NTER* legislation has not met these requirements so far, because after more than two years of application, the results of the *NTER* legislation have been ‘ambiguous at best’, and therefore without obvious, positive, already achieved results, it cannot be claimed that these measures can

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<sup>915</sup> Ibid 50.

<sup>916</sup> Ibid. These historically entrenched disadvantages of indigenous people are reflected upon by the *NTER* Review Board, which stated that ‘there is a strong sense of injustice that Aboriginal people and their culture have been seen as exclusively responsible for problems within their communities that have arisen from decades of cumulative neglect by governments in failing to provide the most basic standards of health, housing, education and ancillary services enjoyed by the wider Australian community’: at 51.

<sup>917</sup> Ibid 52. See also Sandy Miliwanga and Kathleen Clapham, ‘The Northern Territory Intervention in Australia: A Grassroots Perspective’ in Christine de Matos and Rowena Ward (eds) *Gender, Power, and Military Occupations – Asia Pacific and the Middle East since 1945* (Routledge, 2012) 136-7.

<sup>918</sup> See also Hon Jenny Macklin MP, ‘Improving Community Safety under the Northern Territory Emergency Response’ (19 June 2010) retrieved on 10 July 2012 from <http://www.jennymacklin.fahcsia.gov.au/node/817>; and William J H Glasson, ‘The Northern Territory Emergency Response: a Chance to Heal Australia’s Worst Sore’ (2007) 187 (11) *Medical Journal of Australia* 614.

<sup>919</sup> United Nations, Human Rights Council General Assembly, Fifteenth Session, above n 100, 64.

<sup>920</sup> Ibid 57.

be regarded as necessary if they do not achieve the intended outcomes.<sup>921</sup> In order to determine whether a special measure is beneficial for the racial group involved, it is possible to assess retrospectively whether or not an already applied special measure has been able to produce a beneficial result, and is therefore regarded as necessary under *CERD*. Hence, it seems that it is not a requirement of a special measure to be completely beneficial for a racial group from the start of such a measure, but it would be deemed sufficient if short-term detrimental effects of a special measure could produce a beneficial result after a certain time of application, which can be assessed retrospectively.

In this view, the *NTER* legislation could have been regarded as a special measure under *CERD* and the *RDA 1975*, even though it has had some detrimental effects on the racial group involved, if after 2 years of application the *NTER* legislation would have produced a beneficial result. A further requirement to allow a special measure that has potentially detrimental effects – a negative special measure - is the consultation and consent of the group involved. This has been emphasised by *CERD* officials stating that ‘any discriminatory measures or limitations on rights should exist only on the basis of the free, prior and informed consent’ of the racial group concerned.<sup>922</sup>

The Committee on *CERD* also required that States ‘ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities’.<sup>923</sup> This requirement for special measures by *CERD* had not been followed by the Australian Government when the first unamended *NTER* legislation was established.<sup>924</sup> However, the Australian Government responded to the concerns of the *CERD* officials in regards to the *NTER* legislation by announcing the

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<sup>921</sup> Ibid 65-6. *CERD* officials stated that ‘after having been in place for well more than two years, the discriminatory measures of the *NTER* cannot be found necessary to the legitimate objectives they are intended to serve, if the discriminatory treatment is not shown to actually be achieving the intended results’. Also, ‘the question is not simply whether the *NTER* measures are yielding results; but whether the discriminatory, rights-impairing aspects of the measures are themselves proportional and necessary to the results. The Special Rapporteur reaffirms his assessment that the evidence in this regard is ambiguous at best’: at 65-6.

<sup>922</sup> Ibid 57.

<sup>923</sup> Ibid 50.

<sup>924</sup> Ibid 51.

reinstatement of the *RDA 1975* by the end of 2010.<sup>925</sup> The *NTER* legislation was amended in June 2010 by the ‘*Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2009* (Cth) and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2009* (Cth)’, also called *Northern Territory Intervention Amendment Legislation*.<sup>926</sup> It was ensured that the amended *NTER* legislation was accompanied by sufficient consultations with the indigenous groups concerned in order to fulfil the requirement of *CERD* in regards to detrimental special measures.<sup>927</sup>

Overall, whether or not short-term detrimental effects of a special measure should be allowed if a long-term beneficial outcome can be achieved depends on the circumstances. *CERD* officials were willing to accept the unamended *NTER* legislation if beneficial results had demonstrated its necessity. After 2 years of application an undisputable beneficial outcome was still missing, and therefore *CERD* officials did not accept the *NTER* legislation as sufficiently successful. However, nothing has been stated by *CERD* officials about time frames in which beneficial effects have to outweigh the detrimental ones. The example of the Northern Territory Emergency Response suggests that short-term detrimental effects of a special measure do not necessarily disqualify a measure from being acknowledged as a special measure under *CERD* and the *RDA 1975*, if its implementation is accompanied by the informed consent of the racial groups concerned, based on good intentions for their advancement, and if beneficial results can be proven in the long run.

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<sup>925</sup> United Nations, *CERD*, Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination* (77<sup>th</sup> session, 13 September 2010) 4.

<sup>926</sup> NGO Steering Group, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on the Elimination of Racial Discrimination – Australia* (June 2010) 35.

<sup>927</sup> United Nations, Human Rights Council General Assembly, Fifteenth Session, above n 100, 55.

## B. *Sex Discrimination Act 1984 (Cth)*

The *SDA 1984* allows the application of affirmative action in relation to gender. Its passage represented Australia's commitment to include women in all areas of employment 'on the same terms as men'.<sup>928</sup> The idea of furthering the goal of equal opportunities for women originally did not include the concept of preferential treatment, or special measures (affirmative action).<sup>929</sup> It was assumed that equal opportunities in employment meant the opportunity to compete for jobs 'on the same terms as men' in accordance with formal equality without any regard to gender.<sup>930</sup>

The *SDA 1984* represents Australia's attempt to comply with *CEDAW* and aims to eliminate discrimination against women.<sup>931</sup> However, the Australian way of implementing *CEDAW* through the *SDA 1984* has not translated the entire values of *CEDAW* into Australian law. One of the main differences is that the *SDA 1984* protects both genders – male and female – from gender discrimination, whilst *CEDAW* only aims to provide protection to women, which has been criticised 'as watering down *CEDAW*'s focus'.<sup>932</sup> Nevertheless, the *SDA 1984* can also be regarded as being progressive in interpreting the broadly designed *CEDAW* in a more narrow way, for example, by 'paying attention to sexual harassment as an aspect of sex discrimination'.<sup>933</sup> In addition, Australia has made reservations to *CEDAW* in regards to women in combat situations in the military and mandatory paid maternity leave.<sup>934</sup> However, Australia passed the *Paid Parental Leave Act*

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<sup>928</sup> Thornton and Luker, above n 813, 25.

<sup>929</sup> Ibid 30.

<sup>930</sup> Ibid.

<sup>931</sup> Mary Crock and Penelope Mathew, 'Immigration Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (The Federation Press, 1998) 148; *CEDAW* is used as an abbreviation for the *Convention on the Elimination of all Forms of Discrimination Against Women*.

<sup>932</sup> Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27 (3) *University of New South Wales Law Journal* 859-60.

<sup>933</sup> Ibid 860.

<sup>934</sup> Thornton and Luker, above n 813, 32. United Nations, *CEDAW Treaty Collection Australia*, footnote 3, 11 September 2011 <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#3)>.

Overall, paid maternity leave is regarded as crucial for the equality of women at the workplace. Therefore, Australia's reservation in regards to this matter has been controversial, and there 'have been calls for the removal of the paid maternity leave reservation, all of which have been resisted. The impression given by the Government is that Australian women are not

in June 2010, which has commenced on 1 January 2011 and represents an important step towards gender equality under *CEDAW*.<sup>935</sup>

Whilst *CEDAW* aims at substantive equality for women in public and private employment, the *SDA 1984* aimed originally only at formal equality.<sup>936</sup> The passage of the *SDA 1984*<sup>937</sup> into law was controversial and contained several compromises.<sup>938</sup> For example, the wording of the Act's objects includes the term 'so far as is possible' regarding the elimination of sex discrimination. This was criticised by the Women's Electoral Lobby and the Senate Standing Committee on Legal and Constitutional Affairs in 2008, which claimed that in general wrongful behaviour that is included in legislation has to be eliminated entirely and not just 'so far as is possible'.<sup>939</sup> Furthermore, the *SDA 1984* includes various exemptions which are not consistent with the principles of gender equality in *CEDAW*.<sup>940</sup> Unlike the *RDA 1975*, which contains a general clause prohibiting racial discrimination,<sup>941</sup> the *SDA 1984* does not include such a clause, only various descriptions of gender discriminatory acts, which altogether are not sufficient to fulfil Australia's obligations under *CEDAW*.<sup>942</sup> Overall, the *SDA*

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disadvantaged by its failure to comply with *CEDAW* in this respect'. Charlesworth and Charlesworth, above n 932, 861.

<sup>935</sup> Australian Human Rights Commission, *Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – Independent Report to the Committee on the Elimination of Discrimination against Women* (5 July 2010) 6-7.

<sup>936</sup> Thornton and Luker, above n 813, 31.

<sup>937</sup> *SDA* is used as an abbreviation for the *Sex Discrimination Act 1984* (Cth).

<sup>938</sup> Marian Sawer, Norman Abjorensen and Phil Larkin, *Australia: The State of Democracy* (The Federation Press, 2009) 47.

<sup>939</sup> *Ibid.* The Senate of the Standing Committee on Legal and Constitutional Affairs recommended in regards to the *Sex Discrimination Act 1984* (Cth) that 'the preamble to the Act and subsections 3(b), (ba) and (c) of the Act be amended by deleting the phrase "so far as is possible". The Senate, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) xiii; Furthermore, the Women's Electoral Lobby stated in relation to these subsections that: 'It is not statutory convention within Australian law to proscribe wrongful behaviour and then qualify it with the words "so far as is possible". We would not tolerate an injunction "to drive on left-hand side of the road "so far as possible". Most significantly, no such qualification is used in *CEDAW*, which "condemns discrimination against women in all its forms" (Art 2)': at 18.

<sup>940</sup> Hilary Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalization versus Sovereignty* (The Federation Press, 1995) 134; The exemptions of the *SDA* comprise sections 30 to 47 ranging from areas like accommodation over religious bodies to sport.

<sup>941</sup> *Ibid.* Section 9 (1) of the *Racial Discrimination Act 1975* (Cth) represents a general prohibition for racial discrimination.

<sup>942</sup> For example, the objectives of the *SDA* are outlined in section 3 stating that: 'The objects of this Act are: (a) to give effect to certain provisions of the Convention on the Elimination of all

1984 is only ‘a partial and porous translation of Australia’s international commitments’ under *CEDAW*.<sup>943</sup> Under Australia’s constitutional system, since the *SDA* must be implementing the obligations of *CEDAW* to be valid under the external affairs power, it could not incorporate measures beyond *CEDAW*. Partial implementation is, however, constitutionally permissible.<sup>944</sup>

In 1995, the *SDA 1984* was amended by the *Sex Discrimination Amendment Act 1995 (Cth)*, which repealed section 33 and introduced section 7D of the Act.<sup>945</sup> The former section 33 of the *SDA 1984* treated special measures as an exemption to the general anti-discrimination rules, which means they were regarded as ‘discriminatory but lawful’.<sup>946</sup> In comparison, section 7D of the amended Act regards special measures not as lawful exemptions from discrimination, but as ‘part of the threshold question of whether there was discrimination at all’.<sup>947</sup> This shift in classification has had its impact on the setting of limitations for the application of special measures, which will be further elaborated in the section about the implementation of affirmative action at a later point in this chapter. Furthermore, the focus on formal equality for women shifted to the focus on substantive equality, due to the existence of structural barriers for women, which indicated that equal treatment was not enough to achieve equal opportunities for women as an end result.<sup>948</sup> These changes to the *SDA 1984* reflect the acknowledgement of the appropriateness of special measures for women in employment by regarding them as aiming at true equality between men and women.

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Forms of Discrimination Against Women; and (b) to eliminate, so far as possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and (ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.’

<sup>943</sup> Charlesworth and Charlesworth, above n 932, 865.

<sup>944</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>945</sup> *Sex Discrimination Amendment Act 1995 (Cth)*.

<sup>946</sup> Julie O’Brien, ‘Affirmative Action, Special Measures and the Sex Discrimination Act’ (2004) 27 (3) *University of New South Wales Law Journal* 841.

<sup>947</sup> *Ibid.*

<sup>948</sup> *Ibid* 841-2.

The *SDA 1984* explicitly allows for special measures like affirmative action in order to achieve substantive equality between men and women, ‘people of different marital status; or women who are (potentially) pregnant and people who are not (potentially) pregnant’.<sup>949</sup> Section 7D (2) of the Act authorises not only the use of special measures, but also declares them as non-discrimination. In order to count as a special measure, the measure has to aim at the achievement of substantive equality as a sole purpose, or ‘for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one’.<sup>950</sup> Hence, a special measure is justified by the *SDA 1984* if at least one of the purposes of the measure is to further or achieve substantive equality. This constitutes a clear limit for special measures under the *SDA 1984* in the form of a test for its purpose. In addition, another limit for special measures is outlined by the Act when it is stated that special measures are not allowed for a purpose that has already been achieved.<sup>951</sup> This constitutes a clear temporary limit for affirmative action. However, the Act does not outline any specifics in relation to this limit. The wording can be interpreted as the temporary requirement for an affirmative action measure, which has to be ended as soon as its purpose has been achieved.

This interpretation coincides with the wording for temporary limits of special measures under *CERD*, *CEDAW* and the *RDA 1975*. However, there is no indication of how it can be determined when the purpose of a special measure has been achieved. The scope of the special measures in the *SDA 1984* is designed in a broad fashion given that the only limitations are based on a test in order to confirm that at least one of the aims of special measures is to achieve or accelerate substantive equality for women, and to ensure that the proportionality of these measures is considered appropriately in relation to their purpose.<sup>952</sup> Therefore, the special measures of the *SDA 1984* encompass a broad range of measures that are able to accommodate ‘both “soft” and “hard” forms of affirmative action’.<sup>953</sup>

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<sup>949</sup> *Sex Discrimination Act* s 7D (1).

<sup>950</sup> *Ibid* s 7D (3).

<sup>951</sup> *Ibid* s 7D (4).

<sup>952</sup> O’Brien, above n 946, 848.

<sup>953</sup> *Ibid*.

Under the *SDA 1984* Australian organisations can choose from a wide range of affirmative action measures ‘such as outreach programs (for example, bringing employment opportunities to the attention of women and encouraging them to apply)’, special job training, or even ‘flexible or inflexible quota rules to actively increase the representation of women in a particular field’.<sup>954</sup> Although affirmative action measures offer a broad range of possibilities of application, it has been largely unsuccessful so far, because it remains ‘rarely implemented in practice’.<sup>955</sup>

Whilst in the United States soft forms of special measures are favoured over hard forms like quotas, Australia’s approach towards quotas under section 7D of the *SDA 1984* was first considered by the Australian Federal Court in the case of *Jacomb v Australian Municipal Administrative Clerical and Services Union (Jacomb)* in 2004.<sup>956</sup> In *Jacomb*, a male applicant who unsuccessfully applied for a job at the executive level of a union claimed to be discriminated against on the grounds of gender, because the union applied a 50 per cent quota for women on the executive level as a special measure under section 7D of the *SDA 1984* in order to accelerate substantive equality for women.<sup>957</sup> The complainant claimed that the special measure of ensuring 50 per cent of women at the executive level of the union was not proportionate, because it exceeded the proportional representation of women in certain union branches.<sup>958</sup> In addition, the special measure did not contain any flexibility in regards to worthy male applicants, who would be suitable for executive positions as well as women.<sup>959</sup> The Court held that the special measure was lawful, because it aimed at, and was suitable to, achieving substantive equality for women.<sup>960</sup> Therefore, the special measure applied by the Union passed the limit for special measures regarding their purpose under section 7D(3) of the *SDA 1984*, which requires that at least one purpose of the measure must be the achievement of substantive equality for

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<sup>954</sup> Sarah Stephens, ‘Discrimination: Adopting a Positive Action Approach to Sex Discrimination’ (2010) 35 (1) *Alternative Law Journal* 36.

<sup>955</sup> *Ibid.*

<sup>956</sup> *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250. O’Brien, above n 946, 842.

<sup>957</sup> *Jacomb* [2004] FCA 1250; O’Brien, above n 946, 842.

<sup>958</sup> *Jacomb* [2004] FCA 1250 [16].

<sup>959</sup> *Ibid* [8].

<sup>960</sup> *Ibid* [62], [64].



women.<sup>961</sup> Furthermore, the Court decided that the special measure applied was proportionate to its goal.<sup>962</sup> The Court was satisfied of the proportionality of the special measure even though it appeared to be inflexible, because it contained a clause that enabled its discontinuance in the event it was no longer needed.<sup>963</sup> This constituted a temporary limit of the special measure applied by the union.

The discontinuance of a special measure is also mentioned in section 7D of the *SDA 1984*, which does not allow for the application for a special measure if its purpose has already been achieved. In *Jacomb*, Crennan J stated in regards to this issue that:

Having regard to the inflexibility of the quotas and the express provisions of subsection 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed.<sup>964</sup>

Crennan J also stated that such a special measure cannot be applied beyond 'the "exigency" (namely the need for substantive equality between men and women in the governance of the union) which called them forth'.<sup>965</sup>

The court in *Jacomb* did not provide an answer to the question of how to determine when a temporary special measure under section 7D of *SDA 1984* has to be ended. Crennan J mentioned the importance of monitoring the effects of a special measure in order to determine when it will have achieved its purpose, but did not outline what kind of monitoring system would be appropriate for this purpose.

The example of *Jacomb* reveals that even though women continue to be disadvantaged in employment matters, special measures to further the development of gender equality are perceived as controversial. Therefore, the

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<sup>961</sup> O'Brien, above n 946, 843.

<sup>962</sup> *Jacomb* [2004] FCA 1250 [65].

<sup>963</sup> Ibid.

<sup>964</sup> Ibid.

<sup>965</sup> Ibid.

implementation of special measures is likely to be challenged by those who do not benefit from them.<sup>966</sup>

The temporary nature of special measures like affirmative action has been acknowledged by the *SDA 1984* and also by the *Jacomb* case. However, neither the legislation nor its interpretation by the courts has outlined how to determine the appropriate deadlines of special measures. Nevertheless, these special measures (affirmative action),<sup>967</sup> can be interpreted with reference to ‘the context, object and purpose of the Convention [*Convention on the Elimination of All Forms of Discrimination against Women*]’ aiming at substantial equality between men and women.<sup>968</sup> Given that one of the objects of the *SDA 1984* is to implement certain regulations of *CEDAW*, the suggestion that the special measures of the Act are only meant to be temporary is consistent with Article 4 (1) of the Convention, which states that ‘... temporary special measures ... shall be discontinued when the objectives of equality of opportunity and treatment have been achieved’.<sup>969</sup> Section 7D of the *SDA 1984* indicates such an important temporary limit in subsection (4), which excludes the implementation of a special measure for a goal that has already been achieved, or in other words requires the termination of a special measure as soon as its purpose is achieved.

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<sup>966</sup> Julie O’Brien, ‘Human Rights: Special Measures and the Sex Discrimination Act’ (February 2005) *Law Society Journal* 17.

<sup>967</sup> Anne-Marie Mooney Cotter, *Gender Injustice: an International Comparative Analysis of Equality in Employment* (2004) 98; Ronalds and Raper, above n 879, 159; *Jacomb* [2004] FCA 149 [42] – [44].

<sup>968</sup> *CEDAW* article 4 (1), see also Ronalds and Raper, above n 879, 159.

<sup>969</sup> *CEDAW* article 4 (1), which states in full that ‘Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved’.

#### IV. SPECIFIC AFFIRMATIVE ACTION LEGISLATION

The most specific legislation in regards to equal opportunities in gender relations is the *Equal Opportunity for Women in the Workplace Act 1999 (Cth) (EOWWA)*.<sup>970</sup> The Act was amended by the *Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth)*, which passed the Senate in November 2012.<sup>971</sup> As a result, the former *EOWWA* is renamed *Workplace Gender Equality Act 2012 (Cth) (WGEA 2012)*.<sup>972</sup> Its amendments focus on equal remuneration and streamlined reporting of gender compositions at the workplace.<sup>973</sup>

The *WGEA 2012* requires employers to implement equal opportunity programs, which are meant to further gender equality for women at the workplace and are monitored by the Workplace Gender Equality Agency (WGEA) (formerly named Equal Opportunity for Women in the Workplace Agency (EOWA)).<sup>974</sup>

##### A. *Workplace Gender Equality Act 2012 (Cth)*

The requirements for the implementation of affirmative action programs by employers started under the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)*, which was superseded by the *Equal Opportunity for Women in the Workplace Act 1999 (Cth) (EOWWA)*.<sup>975</sup> The idea to rename the Act originated from the concern that the term ‘affirmative action’ could lead to confusion regarding the aims of the Act, because this term is ‘too often misconstrued as pertaining to ‘reverse’ or ‘positive’ discrimination based on preferential treatment or quotas’.<sup>976</sup> This change in name can be seen as a step to ensure that *EOWWA* represents a ‘neutral rather than a proactive approach to

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<sup>970</sup> Equal opportunities in employment ‘in relation to Federal public sector employment, government departments are covered by ss 10 and 18 of the *Public Sector Act 1999 (Cth)* and statutory authorities by the *Equal Opportunity (Commonwealth Authorities) Act 1987*. See Rees, Lindsay and Rice, above n 899, 19.

<sup>971</sup> Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Workplace Gender Equality Act 2012 (2012)* 1.

<sup>972</sup> *Equal Opportunity for Women in the Workplace Amendment Bill 2012*, schedule 1 (2).

<sup>973</sup> *Ibid* schedule 1 (2A), (14).

<sup>974</sup> *Ibid* schedule 1 (1).

<sup>975</sup> Paula Maatta, above n 814, 304.

<sup>976</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10144 (Peter Reith, Minister for Employment, Workplace Relations and Small Business).

employment equity'.<sup>977</sup> In addition, the amendments were regarded as necessary to avoid restrictive effects on competition, and to prevent the imposition of 'excessive burdens on businesses' caused by the former affirmative action legislation.<sup>978</sup> The *EOWWA* was amended in November 2012 and renamed *Workplace Gender Equality Act 2012* (Cth) in order to stress its new focus on gender equality regarding equal pay and streamlined reporting of gender compositions in the workforce including 'governing bodies'.<sup>979</sup>

The *WGEA 2012* 'requires private sector companies, unions, non-government schools, higher education institutions and community organisations (that have 100 or more people) to establish a workplace program to remove barriers to women entering and advancing in their organisation'.<sup>980</sup> The *WGEA 2012* is represented by the Workplace Gender Equality Agency.<sup>981</sup> In comparison to the former *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), the *WGEA 2012* is designed more generally in regards to gender equality processes within workplaces,<sup>982</sup> which includes that the former complex 8-step process<sup>983</sup> to implement affirmative action has been replaced with a revised, 'simpler and more straightforward' approach in the form of workplace programs.<sup>984</sup> This simplification includes that 'reporting requirements were

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<sup>977</sup> Andrew Hede, 'Affirmative Action in Australia: Employment Equity at the Crossroads' in Marilyn Davidson and Ronald J Burke (eds), *Women in Management: Current Research Issues* (SAGE, 2000) 289.

<sup>978</sup> Ibid 282.

<sup>979</sup> Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Workplace Gender Equality Act 2012* (2012) 1-2.

<sup>980</sup> United Nations, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, (3 February 2004) above n 75, 60.

<sup>981</sup> Australian Government, see above n 979.

<sup>982</sup> John Burgess, Lindy Henderson and Glenda Strachan, 'Women Workers in Male Dominated Industrial Manufacturing Organisations: Contrasting Workplace Case Studies from Australia' (2005) 16 *Management Revue* 4, 459.

<sup>983</sup> The eight-step process to eliminate discrimination by a relevant employer against women, outlined in the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) includes: '1. Issuing a policy statement; 2. appointing a senior person responsible for affirmative action; 3. consulting with trade unions; 4. consulting with employees, particular women employees; 5. analysing the workforce profile; 6. reviewing employment policies and practices; 7. setting objectives and forward estimates; 8. monitoring and evaluating the program'. Margaret Gardner and Gill Palmer, *Employment Relations – Industrial Relations and Human Resource Management in Australia* (1997) 468; *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), s 8(1).

<sup>984</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10145 (Peter Reith, Minister for Employment, Workplace Relations and Small Business).

weakened’,<sup>985</sup> which means that under certain circumstances reporting requirements can be waived for a specific period of time.<sup>986</sup> Altogether, employers are given ‘considerable latitude in designing the equal opportunity programs’.<sup>987</sup>

The objects of the *WGEA 2012* are outlined in section 2 and include that women should be treated on the basis of merit by their employers, the promotion to eliminate gender discrimination, and to encourage consultations about equal opportunities for women at the workplace.<sup>988</sup> Affirmative action is included in the Act in the form of equal opportunity for women in the workplace programs. The definition of these workplace programs is determined in section 3, which describes them as ‘a program designed to ensure that:

- (a) appropriate action is taken to eliminate all forms of discrimination by the relevant employer against women in relation to employment matters; and
- (b) measures are taken by the relevant employer to contribute to the achievement of equal opportunity for women in relation to employment matters’.<sup>989</sup>

This definition of workplace programs (affirmative action) is very general and neither the term ‘appropriate action’ nor the term ‘measures’ is determined by the Act. The Act does not state what workplace programs have to include, but it outlines what these programs should exclude. This exclusion is described in subsection 3(4) of the Act, which states that ‘Nothing in this Act shall be taken to require a relevant employer to take any action incompatible with the principle

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<sup>985</sup> Gwen Gray and Marian Sawyer, ‘Australian Women: Repertoires of Change’ in Joyce Gelb and Marian Lief Palley (eds), *Women and Politics Around the World: a Comparative History and Survey – Volume I* (ABC Clio, 2009) 253.

<sup>986</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10145-6 (Peter Reith, Minister for Employment, Workplace Relations and Small Business).

<sup>987</sup> Erin Tolley, *Multiculturalism Policy Index: Immigrant Minority Policies* (Queen’s University at Kingston Press Canada, 2011) 13.

<sup>988</sup> Section 2 of the *WGEA 2012* states in full that ‘The principal objects of this Act are: (a) to promote the principle that employment for women should be dealt with on the basis of merit; and (b) to promote, amongst employers, the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters; and (c) to foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment’.

<sup>989</sup> Employment matters are defined in section 3 of the Act including ‘(a) the recruitment procedure, and selection criteria, for appointment or engagement of persons as employees; (b) the promotion, transfer and termination of employment of employees; (c) training and development for employees; (d) work organisation; (e) conditions of service of employees; (f) arrangements for dealing with sex-based harassment of women in the workplace; (g) arrangements for dealing with pregnant, or potentially pregnant employees and employees who are breastfeeding their children.’

that employment matters should be dealt with on the basis of merit.’ The focus on merit in this regulation states clearly that measures like quotas, preferential hiring or other preferential treatment in regards to gender, that are not directly based on merit, are unlawful. Therefore, affirmative action policies in form of workplace programs are completely based on merit. As a result, any application of affirmative action for women who are not equally qualified with male candidates is forbidden.

The strict merit principle of the *WGEA 2012* contradicts the *SDA 1984*, which allows for affirmative action in a wide range of applications - from job training to quotas - if these measures ‘are deemed necessary in order to increase the representation of women in a given field’.<sup>990</sup> In contrast to the *WGEA 2012*, the *SDA 1984* does not focus on a merit principle, but on the mere necessity of an increase in representation of women. This contradiction between the two Acts ‘undermines any capacity for using special measures’, and ‘creates confusion as to what is permissible’, especially in regards to statements of ‘current and previous Governments that Australia does not support the use of quotas or targets’.<sup>991</sup>

The neutral approach of the *WGEA 2012* in regards to the application of affirmative action can be seen as contradictory to the advancement of women in the workplace, because the aim of promoting substantive equality between the genders usually implies that some sort of special measures will be implemented to further the employment opportunities of women beyond the principle of merit.<sup>992</sup> The focus on merit seems to suit an equal opportunity at the workplace approach better than the usual affirmative action measures beyond merit, but such a neutral approach has its own challenges. Most obviously, the concept of ‘merit’ might hide the fact that men and women have different duties and responsibilities in their family lives which makes it harder for them to compete

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<sup>990</sup> Stephens, above n 954, 37.

<sup>991</sup> Ibid; see also Australian Government, Australia’s combined 6<sup>th</sup> and 7<sup>th</sup> Report on the Implementation of the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (2008) 2.23.

<sup>992</sup> Isabel Karpin and Karen O’Connell, ‘Speaking into a Silence – Embedded Constitutionalism, the Australian Constitution, and the Rights of Women’ in Beverley Baines and Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005) 35.

on an equal level in the workplace.<sup>993</sup> If women are seen as having a natural disadvantage in working environments, employers might tend to focus on men instead of women along the lines of the idea ‘that men do not need to be involved in equality measures and that there is no need to change organisational structures’.<sup>994</sup>

Section 8 of *WGEA 2012* does not explain what equal opportunity measures are supposed to be, but outlines how to develop and implement workplace programs for equal opportunities for women (affirmative action) by employers.<sup>995</sup> It includes the requirement of the preparation of a workplace profile and a separate analysis to identify equal opportunity issues within the employer’s workplace, which have to be addressed by the relevant workplace program.<sup>996</sup> In addition,

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<sup>993</sup> The Australian Human Rights Commission issued a report called *Gender Equality Blueprint* in 2010, which recommends key reforms regarding gender equality in Australia. This report states that ‘Women continue to experience discrimination in the paid workforce. This is demonstrated by the level of women’s workforce participation, particularly women with young children, the gender gap in pay, the level of women’s representation in management and leadership positions, complaints of pregnancy discrimination and the prevalence of sexual harassment’. The report also makes a recommendation in relation to the *WGEA 2012* (which is abbreviated as *EOWW Act*) and states in recommendation 13 that ‘To ensure women experience equal outcomes in the workplace: the *EOWW Act* should be amended to change its name to the *Gender Equality in the Workplace Act* and rename the Equal Opportunity in the Workplace Agency as the Gender Equality in the Workplace Agency; the achievement of gender equality should be a key object of the *EOWW Act*; the *EOWW Act* should be amended to cover Australian Government departments and statutory agencies with 100 employees and more; the *EOWW Act* should be amended to include pay equity as a separate ‘employment matter’; and the Equal Opportunity in the Workplace Agency should be adequately funded so that it can properly fulfil its statutory mandate’. Australian Human Rights Commission, *2010 Gender Equality Blueprint* (2010) 21; Clare Burton, *Redefining Merit* (1988) 77; see also Belinda Smith and Joellen Riley, ‘Family-Friendly Work Practices and the Law’ (2004) 26 (3) *Sydney Law Review* 395-426.

<sup>994</sup> Glenda Strachan, John Burgess and Lindy Henderson, ‘Equal Employment Opportunity Legislation and Policies: the Australian Experience’ (2007) 26 *Equal Opportunities International* 6, 530.

<sup>995</sup> *WGEA 2012* s 6.

<sup>996</sup> The complete section 8 of the Act states that ‘(1) Before developing a workplace program, a relevant employer must: (a) confer responsibility for the development and implementation of the program (including continuous review of the program) on a person or persons having sufficient authority and status within the management of the relevant employer to enable the person or persons properly to develop and implement the program; and (b) consult with employees (or their nominated representatives) of the relevant employer, particularly employees who are women. (2) In preparing a workplace program, a relevant employer must prepare a workplace profile. The workplace profile must relate to the employer’s workplace at a specific date occurring not more than 6 months before the start of the period to which the program relates. (3) After preparing the profile, the relevant employer must prepare an analysis of the issues relating to employment matters that the employer would need to address to achieve equal opportunity for women in the employer’s workplace. (4) The program must provide for: (a) actions to be taken in relation to priority issues identified in the analysis; and (b) evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer’s workplace. (5) A workplace program of a relevant employer may contain any other provision that the relevant employer thinks fit that is not inconsistent with the objects of this Act. (6) A relevant employer must have a workplace program for each reporting period (see section 13A)’.

the workplace program must provide for an ‘evaluation of the effectiveness’ for its proposed measures.<sup>997</sup> This introduction of workplace programs in the *WGEA 2012* was perceived as a new focus on measures and their achievements by Peter Reith, the former Minister for Employment, Workplace Relations and Small Business in Australia, who stated in Parliament that this approach would ‘provide opportunities for employers and workers to be genuinely innovative, and encourage real and appropriate measures to be put in place and gains to be made’.<sup>998</sup> As in the *WGEA 2012* itself, Parliament did not define what ‘real and appropriate measures’ are supposed to look like.<sup>999</sup>

The Act is administered by the WGEA,<sup>1000</sup> which issues guidelines, offers assistance to employers and monitors their compliance with the Act.<sup>1001</sup> In 2010, 2,587 companies complied with the Act, whilst 12 companies did not.<sup>1002</sup> Employers who violate *WGEA 2012* are sanctioned by being named in Parliament, and are ineligible for government contracts and industry assistance,<sup>1003</sup> which can be seen as a rather weak and limited penalty.<sup>1004</sup>

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<sup>997</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10145 (Peter Reith, Minister for Employment, Workplace Relations and Small Business); Section 8(4) of *WGEA 2012* states that a workplace ‘program must provide for: (a) actions to be taken in relation to priority issues identified in the analysis; and (b) evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer’s workplace’.

<sup>998</sup> *Ibid.*

<sup>999</sup> Strachan, Burgess and Henderson, above n 994, 527.

<sup>1000</sup> ‘WGEA is a statutory authority located within the portfolio of the Australian Commonwealth Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA). The Directorship of WGEA is a statutory appointment made by the Governor-General of Australia. The Director reports directly to the Minister for the Status of Women and embodies the powers and functions as described in the Act’. Equal Opportunity for Women in the Workplace Agency, *Annual Report 2008/2009* (2009) 12.

<sup>1001</sup> Nick O’Neill et al, *Retreat from Injustice: Human Rights Law in Australia* (The Federation Press, 2<sup>nd</sup> ed, 2004) 550.

<sup>1002</sup> Australian Government, Equal Opportunity for Women in the Workplace Agency, *2010 Annual Report* (2010) 15.

<sup>1003</sup> Strachan, Burgess and Henderson, above n 994, 529.

<sup>1004</sup> Belinda Smith, ‘A Regulatory Analysis of the *Sex Discrimination Act* 1984 (Cth): Can It Effect Equality Or Only Redress Harm?’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (The Federation Press, 2006) 110; The Australian Council of Trade Unions (ACTU) reviewed the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) and its Agency in 2009. ACTU stated that the *EOWWA* (now *WGEA 2012*) ‘needs to include some punitive sanctions in order to ensure compliance with the basic requirements of the Act and to indicate the seriousness in which the government holds EEO. Breaches of the requirement to lodge a report, to address the key reporting criteria or to follow the process outlined in the Act should attract appropriate penalties which would be enforced through the Office of the Fair Work Ombudsman’. Australian Council of Trade Unions, *Submission of the*



Another limitation of *WGEA 2012* is that it only applies to employers with 100 or more employees, which leads to a limited coverage of relevant employers.<sup>1005</sup> In addition, affirmative action in the form of workplace programs of the *WGEA 2012* is only limited in scope, and is not connected formally by any link in the Act to special measures under the *SDA 1984*, which are meant to be only temporary.<sup>1006</sup>

In the end, *WGEA 2012* ‘institutes little more than self-regulation’ in regards to the implementation of affirmative action.<sup>1007</sup> Furthermore, the *WGEA 2012* does not create any rights, ‘establishes no avenue of complaint, and requires only reporting on a program without reference to progress’.<sup>1008</sup> It seems that the *WGEA 2012* has not been established to further gender equality by implementing specific limits like numerical goals or timetables for achieving substantive gender equality in the workplace, but to ensure that companies increase their awareness of gender issues in employment in order to enhance gender impartiality in the hiring process. Altogether, the *WGEA 2012* does not state any temporal limits or numerical limits for affirmative action. However, through the increase of awareness of discriminatory situations at the workplace and the furthering of impartiality in hiring and promotion, the *WGEA 2012* does further equal opportunities between men and women.

## V. IMPLEMENTATION OF AFFIRMATIVE ACTION

In Australia, two government agencies are primarily responsible for the implementation of special measures (affirmative action). These are the Australian Human Rights Commission (AHRC) and the WGEA.<sup>1009</sup> Whilst the role of the EOWA has been outlined in the previous section, this part of the thesis investigates the AHRC in relation to the implementation of special

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*Australian Council of Trade Unions to the Review of the Equal Opportunity for Women in the Workplace Act and Agency* (2009) 20.

<sup>1005</sup> *WGEA 2012* s 3.

<sup>1006</sup> Smith, above n 1004, 110.

<sup>1007</sup> Stephens, above n 954, 36.

<sup>1008</sup> *Ibid.*

<sup>1009</sup> The Australian Human Rights Commission is based on the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which was renamed in 2008 as the *Australian Human Rights Commission Act 1986* (Cth).

measures and their limits. The AHRC is comparable with the United States Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance (OFCC), as well as the Canadian Public Service Commission (CPSC),<sup>1010</sup> which are all responsible for the administration of affirmative action, for example, through consulting companies, monitoring compliance, and issuing regulations and guidelines in relation to the implementation of affirmative action. The EEOC in the United States and the CPSC in Canada have issued guidelines that include limitations of affirmative action in form of numerical goals and timetables.<sup>1011</sup> This part of the thesis investigates what action the AHRC has taken in relation to the implementation of affirmative action in Australia.

### ***A. Australian Human Rights Commission***

The Australian Government established the AHRC ‘to protect and promote the human rights of all people in Australia’.<sup>1012</sup> The former Human Rights and Equal Opportunity Commission, , which was established on 10 December 1986, was renamed as Australian Human Rights Commission in 2008.<sup>1013</sup> In 2000, the Commission’s role ‘of hearing complaints of unlawful discrimination’ was ‘transferred to the Federal Court and the Federal Magistrates Service’, but the Commission is still permitted to act ‘as “amicus curiae” (friend of the court) in relevant cases before the Courts’.<sup>1014</sup> The tasks of the AHRC include its statutory responsibilities under the *Age Discrimination Act 2004* (Cth), the *Workplace Relations Act 1996* (Cth), the *Native Title Act 1993* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Australian Human Rights Commission Act*

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<sup>1010</sup> See Chapter 5.

<sup>1011</sup> See Chapters 4 and 5.

<sup>1012</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 8, 10A; Australian Human Rights Commission, *About the Australian Human Rights Commission* (online) 14 September 2011 <[http://www.hreoc.gov.au/about/publications/brochure/info\\_sheet2009.html](http://www.hreoc.gov.au/about/publications/brochure/info_sheet2009.html)>.

<sup>1013</sup> *Australian Human Rights Commission Act 1986* (Cth) s 1, Australian Human Rights Commission, *History of the Commission* (online) 14 September 2011 <<http://www.hreoc.gov.au/about/history/index.html>>. Even though the name of the Commission changed in 2008, its rights and powers are still based on the *Human Rights and Equal Opportunity Commission Act*. See also *Disability Discrimination and Other Human Rights Legislation Amendment Act 2008* (Cth) Schedule 3. In addition, the *Workplace Relations Act 1996* (Cth) is no longer in force but the AHRC has limited powers under the *Fair Work Act 2009* (Cth).

<sup>1014</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 13-15, 35.

1986 (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Racial Discrimination Act 1975* (Cth).<sup>1015</sup> Moreover, the AHRC provides education and legal advocacy in relation to human rights, raises public awareness on human rights issues, handles discrimination cases, and researches and contributes to anti-discrimination policy developments.<sup>1016</sup> Overall, the influence of the AHRC on ‘outcomes in relation to specific campaigns [has been] limited’ due to the character of the AHRC’s work, the effectiveness of which ‘relies heavily on a favourable response from government’.<sup>1017</sup>

The AHRC is also responsible for ‘investigating discrimination complaints’ and ‘advising the Commonwealth government on legislation posing issues for human rights’.<sup>1018</sup> A complaint can be lodged with the Australian Human Rights Commission in relation to gender or racial discrimination arising from ‘refused or dismissed employment, denied promotion, transfer or other benefits associated with employment, less favourable terms or conditions of employment or denied access to training opportunities’.<sup>1019</sup> If the complaint is sustained, the AHRC will contact the other party involved in order to resolve the issue by conciliation.<sup>1020</sup> The conciliation process can result in ‘an apology; reinstatement to a job; a flexible work arrangement; the provision of goods and services in a non-discriminatory way; changes in an organisation’s policies and practices; payment or financial compensation’.<sup>1021</sup> If the conciliation process is not successful, the complaint can be lodged with the Federal Court of Australia.<sup>1022</sup> It is a requirement to lodge a complaint with the AHRC in order to be able to proceed further to the Federal Court of Australia, but there is no requirement of a

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<sup>1015</sup> *Australian Human Rights Commission Act 1986* (Cth) s 11 (1) (a), Australian Human Rights Commission, *About the Australian Human Rights Commission* (online), above n 1012.

<sup>1016</sup> *Ibid.*

<sup>1017</sup> Sylvia Arzey and Luke McNamara, ‘Invoking International Human Rights Law in a “Rights-Free-Zone”’: Indigenous Justice Campaigns in Australia’ (John Hopkins University Press, 2011) 33 *Human Rights Quarterly* 736.

<sup>1018</sup> *Ibid.*

<sup>1019</sup> Australian Human Rights Commission, *Know Your Rights: Sex Discrimination and Sexual Harassment* (2010) 1-2.

<sup>1020</sup> *Ibid* 6; Australian Human Rights Commission, *Know Your Rights: Racial Discrimination and Vilification* (2009) 3.

<sup>1021</sup> Australian Human Rights Commission, *Know Your Rights*, above n 1019, 7.

<sup>1022</sup> *Ibid* 6.

particular outcome of the AHRC ‘about the merit of the complaint for it to proceed to litigation in the courts’.<sup>1023</sup>

The AHRC has issued a few guidelines in relation to special measures under the *RDA 1975* and the *SDA 1984*. The AHRC’s guidelines about special measures under the *RDA 1975* require a ‘sole-purpose test’ in order to determine whether or not a measure can qualify as a special measure. As the name of the test implies, ‘a special measure must be for the sole purpose of advancing the group concerned’.<sup>1024</sup> This sole-purpose test constitutes a clear limit for the application of special measures. The requirement distinguishes the guidelines under the *RDA 1975* from the requirements of the *SDA 1984*, in which special measures are not subject to the sole purpose test.<sup>1025</sup> The limitation for special measures in regards to their purpose is much stricter under the *RDA 1975* than under the *SDA 1984*. This situation could be explained by the fact that whilst special measures under the *SDA 1984* are regarded as lawful, special measures under the *RDA 1975* are perceived as an exception to the prohibition of racial discrimination, which makes them discriminatory but lawful.

The AHRC guidelines for the *RDA 1975* outlines another limit for special measures which stresses the temporary nature of these measures by stating that ‘special measures cannot permanently set up separate rights for a particular racial group’, which means that ‘the measure must be temporary, even though it may take a very long time to achieve its objectives’.<sup>1026</sup> These AHRC guidelines provide no further indications about how a temporary limit has to be set up, or how the length of its duration should be determined.

The AHRC has outlined the lawfulness of special measures under the *RDA 1975* in one of their publications in 2008 by stating that special measures will ‘only be

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<sup>1023</sup> Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975 – Background Paper No 1* (2007-2008) 17.

<sup>1024</sup> Australian Human Rights Commission, *Race Discrimination – Special Measures* (online) 13 September 2011 <[http://www.hreoc.gov.au/racial\\_discrimination/guide\\_law/special\\_measures.htm](http://www.hreoc.gov.au/racial_discrimination/guide_law/special_measures.htm)>.

<sup>1025</sup> Australian Human Rights Commission, *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984 – Criteria – Purpose of the Special Measure* (online) 7 October 2011 <[http://www.hreoc.gov.au/legal/exemptions/sda\\_exemption/sda/guidelines1996.html](http://www.hreoc.gov.au/legal/exemptions/sda_exemption/sda/guidelines1996.html)>.

<sup>1026</sup> Australian Human Rights Commission, *Race Discrimination – Special Measures* (online) 13 September 2011 <[http://www.hreoc.gov.au/racial\\_discrimination/guide\\_law/special\\_measures.htm](http://www.hreoc.gov.au/racial_discrimination/guide_law/special_measures.htm)>.

lawful to the extent that the group concerned continues to require special measures to compensate for disadvantage, and will become invalid discrimination once the measures are no longer required in the interests of substantive equality'.<sup>1027</sup> In comparison, the AHRC guidelines for the *SDA 1984* also constitute a temporary limitation by stating that 'the measure must not be taken for a purpose which has been achieved', and that the 'identified inequality which the measure is designed to address must still exist for the measure to be justified'.<sup>1028</sup> The temporary limits for special measures under the *SDA 1984* resemble those under the *RDA 1975* in so far as both require the elimination of a special measure at some point in time. However, there is nothing stated about how the timeframe in relation to this matter can be determined.

The AHRC guidelines on special measures under the *SDA 1984* state that such a measure might include an 'act, practice, program, plan, policy arrangement, mechanism or activity, taken for the purpose of achieving substantive equality between men and women; people of different marital status; women who are pregnant and people who are not pregnant; or women who are potentially pregnant and people who are not potentially pregnant'.<sup>1029</sup> These guidelines also outline when a special measure can be regarded as reasonable action, which means that a special measure must be tailored to achieve the desired outcome.<sup>1030</sup>

The appropriateness of a special measure can be determined by several points, which may include 'a comprehensive analysis of the inequality which the measure is designed to address; a carefully planned and implemented measure; an explanation of the way in which the measure will achieve the purpose; and an ongoing evaluation methodology to determine whether equality has been achieved'.<sup>1031</sup> It is important to keep in mind that the outlined procedure to analyse the appropriateness of special measures under the *SDA 1984* is on a voluntary basis, which gives employers much flexibility and discretion regarding the way they want to implement and monitor the progress of special

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<sup>1027</sup> Human Rights and Equal Opportunity Commission, above n 1023, 44.

<sup>1028</sup> Australian Human Rights Commission, *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*, above n 1025.

<sup>1029</sup> *Ibid* 3.

<sup>1030</sup> *Ibid* 7.

<sup>1031</sup> *Ibid*.

measures.<sup>1032</sup> The AHRC is interested in encouraging the voluntary implementation of special measures (affirmative action) in employment, and therefore the guidelines given are meant to support potential employers in implementing affirmative action.<sup>1033</sup> Therefore, the special measure ‘does not have to be part of a specific affirmative action plan or a formal written plan’.<sup>1034</sup> Special measures under the *RDA 1975* can be taken voluntarily by private organisations, or state and federal governments which have to decide whether or not there is a need to implement special measures.<sup>1035</sup>

Overall, the AHRC applies higher scrutiny to the implementation of special measures under the *RDA 1975* than under the *SDA 1984*, because the former are regarded as a lawful form of discrimination, whilst special measures under the *SDA 1984* are perceived as lawful. The limitations for special measures under both Acts are based on the international treaties *CERD* and *CEDAW*, which apply similar temporal limitations that can be implemented as long as the purpose of a special measure has not been achieved.

## VI. CONCLUSION

This chapter about Australia and its implementation of limits for affirmative action revealed important differences from the limits for affirmative action that have been implemented in the United States and Canada. Anti-discrimination legislation in Australia allows for the implementation of special measures (affirmative action), but do not outline any mandatory requirements or goals or time limits to frame their implementation. Moreover, the government agencies responsible for the implementation of special measures – the WGEA and the AHRC – have not issued comprehensive guidelines about special measures, but have outlined broad limitations for special measures in regards to their purpose and temporal application, which are mainly based on the guidelines for special measures under *CERD* and *CEDAW*. Whilst the limitations of affirmative action

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<sup>1032</sup> Ibid.

<sup>1033</sup> Ibid.

<sup>1034</sup> Ibid.

<sup>1035</sup> Australian Human Rights Commission, *Race Discrimination – Special Measures*, above n 1025.

(special measures) in the United States and Canada have included explicit limits like short-term or long-term goals, and numerical or non-numerical goals (in Canada), and on the executive level government agencies have issued comprehensive guidelines to support the implementation of special measures (Canada and the United States), Australia approaches the application and limitations of affirmative action in a more open manner on a case-to-case basis.

Moreover, the High Court of Australia developed a rather generous approach towards limits for affirmative action, by allowing in *Gerhardy v Brown*<sup>1036</sup> a complete land rights act to be regarded as a special measure, and to allow its usage for an unlimited amount of time with regards to the impossibility of determining in advance when its goal could be achieved.<sup>1037</sup> More specifically, the High Court concluded that the meaning of ‘temporary limit’ of a special measure can only be determined by the intention to terminate the measure as soon as its goal has been achieved. Therefore, a sunset-clause or deadline is not a requirement for the adoption of a special measure in Australia.

Despite the progressive judgment of *Gerhardy v Brown*<sup>1038</sup> in the context of Indigenous rights, and the fact that the *Australian Constitution* does not forbid the application of affirmative action, its implementation has been weaker than in the United States and Canada. There is no doubt that the legal framework in Australia has the potential for a much more extensive application of affirmative action measures. Overall, Australia’s obligations under *CERD* and *CEDAW* have not been entirely met and temporary special measures are not implemented as requested by both international treaties.

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<sup>1036</sup> (1985) 159 CLR 70.

<sup>1037</sup> It has to be kept in mind that the context of affirmative action in employment differs from the situation of indigenous people who are protected by a land rights act.

<sup>1038</sup> (1985) 159 CLR 70.

## **CHAPTER SEVEN**

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**AFFIRMATIVE ACTION: FOR A LIMITED TIME ONLY?**



## CHAPTER SEVEN

### AFFIRMATIVE ACTION: FOR A LIMITED TIME ONLY?

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## I. INTRODUCTION

This thesis commenced with the proposition that affirmative action is designed to eliminate racial and gender discrimination for disadvantaged groups in society by promoting equal opportunities and substantive equality. The thesis has considered how affirmative action policies should be designed to be consistent with the principles of equality underpinning them. In particular, it has considered whether policies should be temporary, continuing only until a particular equality outcome has been reached, or whether its design should be based on permanent legislation due to the ongoing issue of discrimination and inequality. This remains a fundamental consideration in assessing the role of affirmative action.

The investigation of the liberal political theories of the state concluded that affirmative action can only be supported if it is limited in time or tailored to the achievement of specific equality outcomes. However, little attention has been devoted to the question of limits for affirmative action.<sup>1039</sup>

The case studies of the United States, Canada and Australia have revealed different approaches to the implementation of goals and limits of affirmative action, which raises questions about the adequacy of their design. The international treaties *CERD* and *CEDAW*, of which all the comparator countries are members, require goals and timetables for affirmative action.<sup>1040</sup> However, none of the comparator countries have set definite end points for the application of affirmative action legislation despite *CERD* and *CEDAW* requiring such limits.<sup>1041</sup>

It is the purpose of this chapter to outline the results of my comparative analysis and to propose how to design effective affirmative action policies in order to achieve its goals. The thesis has distinguished between two types of affirmative action, which have to be designed differently to achieve their goals. The first

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<sup>1039</sup> See also Chapters 1 and 2 of this thesis. There have only been a few comments made by legislators and scholars in relation to limits for affirmative action, of which most have remained rather vaguely.

<sup>1040</sup> The *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, Article 1(4); and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, Article 4 (1).

<sup>1041</sup> *CERD* article 1(4); *CEDAW* article 4 (1). The issue of how to set limits to affirmative action and whether or not these can also be designed as ‘dormant’ is elaborated in part VI of this chapter.

type pursues equality of opportunity, which could also be referred to as empowerment measures for disadvantaged groups, whilst the second type aims at equality of outcomes. These two responses to inequality are both within the general umbrella of substantive equality.<sup>1042</sup> This chapter demonstrates that goal-oriented and temporal limitations for the second type of affirmative action not only validate these policies, but also that such limits are crucial for their effectiveness.

This chapter attempts to answer the question of how to set limits to the second type of affirmative action by analysing the results of the case studies of the United States, Canada and Australia. For this purpose this chapter identifies the limits of affirmative action set by the comparator countries and assesses issues arising from them.

The analysis reveals that not all the limits identified in the case studies comply with the definition of affirmative action outlined in Chapter 2 and the requirements of *CERD* and *CEDAW*. This disparity is critically analysed by using the rationales for affirmative action of the liberal theories of state developed in Chapter 3. It is concluded that the requirements and standards of *CERD* and *CEDAW* in relation to limits for affirmative action are only able to address inequality adequately if interpreted broadly. Finally, the chapter proposes more effective ways of setting limits for affirmative action based on examples of the case studies.

## II. TYPES OF AFFIRMATIVE ACTION

The investigation of the case studies identified the first type of affirmative action as empowerment measures. These measures aim at equality of opportunity. If applied to the area of employment, this approach focuses on ensuring fair hiring and promotion procedures by increasing impartiality and the awareness of discriminatory issues at the workplace. They involve the implementation and maintenance of affirmative action plans that outline how a business can ensure equal opportunities in employment. The measures include, but are not limited to,

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<sup>1042</sup> See Chapter 2 for further details about the different types of equality.

outreach programmes, evaluation of hiring processes in relation to unintended systemic discriminatory practices, and monitoring processes to assess the progress of the business towards equality of opportunity. Examples of legislation that further this type of affirmative action are the *Equal Employment Opportunity Act of 1972* in the United States and the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)* in Australia.<sup>1043</sup>

Measures which aim at providing equal opportunity do not require numerical goals, timetables or quotas. Instead, the focus is on identifying and removing the barriers to equal participation in the workforce. These measures can be called empowerment measures. Such measures are a pro-active addition to re-active anti-discrimination legislation. In this manner, affirmative action that pursues equality of opportunity is a legal tool that should be applied permanently, like anti-discrimination legislation, in order to prevent unfair treatment at the workplace.

Affirmative action that aims at equality of opportunity pursues an ideal that is itself timeless. Like prohibiting discrimination, pursuing equality of opportunity is a never-ending goal in just societies. Anti-discrimination legislation is designed to last forever, as it upholds a fundamental and enduring principle. While discrimination is a continuing phenomenon, there is a need for legislation to guard against it. And even if discrimination were eliminated from a society, anti-discrimination legislation continues to play a symbolic role of signifying the importance of the principle of equality.

Equality of opportunity requires pro-active measures to prevent unintentional systemic discrimination. Measures that aim at equality of opportunity are designed to uncover inequalities in seemingly neutral practices that have a negative impact on women or minorities. These affirmative action measures require the increase of awareness of gender and race related issues at the workplace as well as constant monitoring processes to ensure that impartiality in hiring and promotion are achieved.

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<sup>1043</sup> See also Chapters 4 and 6 of this thesis.

The second type of affirmative action identified in the case studies aims at achieving equal employment outcomes. In contrast to affirmative action that pursues equality of opportunity, this type of affirmative action can include numerical goals, quotas and timetables. It is designed not only to raise awareness of discriminatory issues at the workplace and to put processes in place to design hiring and promotion procedures more impartially, but also to achieve a proportional representation of disadvantaged groups in society in employment. This second approach to responding to inequality identifies those who are not achieving sufficient outcomes in employment and targets them for affirmative action. Why this type of affirmative action is in need of limits is analysed below.

### **III. WHY AFFIRMATIVE ACTION AIMING AT EQUALITY OF OUTCOME IS IN NEED OF LIMITS**

Anti-discrimination legislation has as its goal the setting of legislative boundaries to certain discriminatory behaviours by exposing it to the operation of the law. Affirmative action policies constitute a legal exception to the principle of non-discrimination.<sup>1044</sup> They are justifiable as an exception on a number of grounds. In general terms, they are justifiable as a special measure to redress substantive inequality, but if applied permanently they violate this principle by setting and maintaining different standards of law for different groups in society.<sup>1045</sup>

In the absence of limits, beneficiaries of affirmative action risk being regarded as ‘less capable’ or even ‘unfit’ for the employment market in jobs in which affirmative action policies apply.<sup>1046</sup> The notion that beneficiaries of affirmative action cannot compete on an equal level in the employment market without these

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<sup>1044</sup> The following section will use the term affirmative action for the second type of affirmative action that aims at equality of outcome.

<sup>1045</sup> The maintenance of different standards of law for different groups in society is also prohibited by *CERD* in Article 1(4) and *CEDAW* in Article 4(1).

<sup>1046</sup> Barbara Bergmann, *In Defense of Affirmative Action* (Basic Books, 1997) 9; Barbara Bergmann, *The Economic Emergence of Women* (Palgrave Mcmillan, 2<sup>nd</sup> ed, 2005) 120.

policies is strengthened if policies are not limited.<sup>1047</sup> Therefore, goals and limits to affirmative action are crucial for the social acceptance and respect of its beneficiaries.

Limits for affirmative action provide coherence to affirmative action. A recent comparative study about affirmative action in different countries, which included the United States and Canada, identified as major barriers for the success of these policies the ‘lack of clarity and ambiguity in legislation’ and the ‘lack of proper oversight’.<sup>1048</sup> The case studies have revealed different levels of guidance with respect to the use of concrete temporal or goal-oriented limits for affirmative action policies.<sup>1049</sup>

In general, the less specific are the terms of affirmative action regulation, the greater the uncertainty that is caused for employers who want to apply affirmative action measures. Employers need clear and consistent regulatory frameworks in order to implement affirmative action effectively. When a policy establishes clear time frames and goals, employers are able to implement an employment strategy to meet the required targets. Employers cannot be expected to invest in policies that add administrative costs to their businesses without a tangible goal for doing so.<sup>1050</sup>

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<sup>1047</sup> This thesis focuses on affirmative action policies in regards to gender and race in employment. The temporal limitation of affirmative action policies in regards to disability might be regarded differently due to the fact that employers might be required to install special equipment for disabled employees in order to provide the conditions to employ them in a safe environment. This is not necessary for women or different ethnic groups. Hence, affirmative action policies in regards to disability might be necessary in a more permanent way to guarantee disabled persons the same employment opportunities as non-disabled persons.

<sup>1048</sup> European Commission, *International Perspectives on Positive Action Measures – a Comparative Analysis in the European Union, Canada, the United States and South Africa* (Office for Official Publications of the European Communities, 2009) 50.

<sup>1049</sup> See Chapters 4 to 6 of this thesis. Whilst Canada offers the most specific guidance for employers about the application of limits for affirmative action, the United States provides only comprehensive guidance to government contractors, and Australia’s approach to guidance in this matter remains unspecific. The different levels of guidance for affirmative action in the comparator countries could be based on practical matters. Canada applies affirmative action more widely than the United States or Australia, which makes it necessary for Canada to provide more guidance for its implementation than the other countries.

<sup>1050</sup> European Commission, above n 1048, 49.

#### **IV. HOW AFFIRMATIVE ACTION AIMING AT EQUALITY OF OUTCOME IS LIMITED IN THE UNITED STATES, CANADA AND AUSTRALIA**

The case studies of the United States, Canada and Australia have not only revealed different ways to implement affirmative action aiming at equality of outcome, but also different types of limits. In the following analysis, limits are divided into three major groups including positive and negative limits as well as temporal limits.

Positive limits include quotas and numerical goals. Negative limits are investigated in the form of annual placement goals and general constitutional limitation clauses. Temporal limits are divided into short-term, interim and long-term temporal limits as well as open-ended formalised temporal limits.<sup>1051</sup> These limits appear in a variety of legal instruments, including constitutions, general anti-discrimination legislation, specific affirmative action legislation, and guidelines and regulations of federal agencies of the United States, Canada and Australia.

The following sections critically analyse whether or not each of these limits is compatible with the definition of affirmative action developed in Chapter 2 of this thesis. Under this definition affirmative action constitutes temporary measures which aim to eliminate the effects of systemic discrimination to promote substantive equality. The sections also investigate whether or not the identified limits comply with the requirements for affirmative action under *CERD* and *CEDAW*.

##### ***A. Positive Limits***

Positive limits, as opposed to negative limits, aim to achieve a certain numerical representation of persons of disadvantaged groups in employment by outlining either percentages or definite numbers for hiring. There are two main positive

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<sup>1051</sup> Open-ended formalised temporal limits have an open ending as the name suggests. The temporal nature is based on a formalised intention to end affirmative action as soon as it is not necessary any longer. Hence, this type of limit does not include a pre-determined timetable.

limits identified in the case studies of this thesis which have been applied to limit the use of affirmative action: quotas and numerical goals.

### 1. *Quotas*

Quotas in relation to affirmative action in employment are strictly set numerical goals for the hiring of employees, mostly involving federal employment, federally regulated businesses, government contractors and subcontractors.<sup>1052</sup>

Quotas can be defined as ‘a requirement to hire or promote a fixed and arbitrary number of persons during a given period’ of time.<sup>1053</sup> Quotas impose limits on affirmative action that are capable of restricting its application in a goal-oriented fashion. A quota is associated with a temporal limit because as soon as the goal of the quota is achieved the affirmative action measure ends. The strict numerical goal in a quota may or may not be connected to an explicit temporal limit.

A quota is the most specific limit for affirmative action. Notwithstanding their immediate impact, quotas are rarely used in setting limits to the promotion of gender and racial equality in employment in the United States, Canada and Australia.<sup>1054</sup> The strict nature of quotas and their focus on either the characteristic of gender or race have led to the perception that they are ‘hard’ measures.<sup>1055</sup> Affirmative action policies using quotas are often labelled as ‘rigid job quotas and reverse discrimination’.<sup>1056</sup> Quotas are regarded as the most aggressive form of affirmative action due the direct exclusion of non-beneficiaries of these policies in order to meet the quota.<sup>1057</sup> This type of limit has only been accepted in rare cases of extreme racial or gender discrimination

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<sup>1052</sup> See for example the *Employment Equity Act 1995* in Canada, which states in section 4 that it applies to ‘[f]ederally regulated private sector employers and Crown corporations with 100 or more employees’.

<sup>1053</sup> This is the definition of quotas in Canada of the *Employment Equity Act 1995*, c44, s 33 (2).

<sup>1054</sup> Please see Chapters 4 to 6 of this thesis.

<sup>1055</sup> Margaret Thornton, ‘Affirmative Action, Merit and Police Recruitment’ (2003) 28 (5) *Alternative Law Journal* 235.

<sup>1056</sup> Colleen Sheppard, ‘Challenging Systemic Racism in Canada’ in Elaine Kennedy-Dubourdieu (ed.), *Race and Inequality: World Perspectives on Affirmative Action* (Ashgate, 2006) 47.

<sup>1057</sup> This is an important difference to the application of numerical goals, which is elaborated further under the next heading ‘numerical goals’ in this chapter.



in the United States, Canada and Australia.<sup>1058</sup> Despite their lack of popularity, quotas are still an effective affirmative action measure due to their clarity and effectiveness. Their legitimacy, however, relies on a prompt resolution to the issue of the discrimination they address.

Most of the legislation in the countries investigated forbids the application of quotas for affirmative action by businesses in employment.<sup>1059</sup> Only the *Sex Discrimination Act 1984* (Cth) in Australia includes ‘flexible or inflexible quota rules to actively increase the representation of women in a particular field’.<sup>1060</sup> Although this Australian legislation includes a broad range of possible applications, it has largely been unsuccessful, because it remains ‘rarely implemented in practice’.<sup>1061</sup> Legislation that forbids the use of quotas by employers often leaves a certain discretion to courts or tribunals to resolve highly discriminatory situations.<sup>1062</sup> Although courts and tribunals use this discretion in rare cases only, these cases have the potential to challenge the judiciary to set very specific limits to the application of affirmative action. Cases in which quotas have been allowed involve discriminatory situations at government agencies as well as private businesses as the following examples demonstrate.

In *United States v Paradise*<sup>1063</sup> the United States Supreme Court allowed the application of a 50 percent quota for the promotion of African American state troopers at the Alabama Department of Public Safety. This decision was made because the Court established that systemic discrimination by the Department had occurred in the past over many decades and that there was a lack of high ranked officers of African American descent at the time.<sup>1064</sup> The 50 percent

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<sup>1058</sup> See Chapters 4 to 6 of this thesis; Thornton, above n 1055, 236.

<sup>1059</sup> In the United States, Section 703(j) of *Title VII of the Civil Rights Act of 1964* excludes the use of quotas for underrepresented groups within a workforce. In Canada, the *Employment Equity Act 1995* forbids quotas in section 33 (1) (e), in which it states that numerical goals cannot be set as quotas.

<sup>1060</sup> Sarah Stephens, ‘Discrimination: Adopting a Positive Action Approach to Sex Discrimination’ (2010) 35 (1) *Alternative Law Journal* 36.

<sup>1061</sup> *Ibid.*

<sup>1062</sup> In the United States, section 706 (g) (1) of *Title VII of the Civil Rights Act of 1964* allows affirmative action in judicial orders. In Canada, the *Canadian Human Rights Act 1977* allows tribunals in section 54 to correct discriminatory practices in employment.

<sup>1063</sup> *United States v Paradise*, 480 US 149 (1987) 149.

<sup>1064</sup> *Ibid* 149-150.

quota was placed on specific ranks which ‘were less than 25 percent black’, and were only applicable if qualified black candidates were available.<sup>1065</sup>

In Canada, the Supreme Court confirmed the validity of quotas applied by a Canadian Tribunal to the Canadian National Railway after it was established that systemic discrimination against women had taken place over decades.<sup>1066</sup> Barriers for women in certain unskilled blue-collar positions were identified by the Tribunal and a special employment program was imposed that included a temporary order to increase the representation of women to 13 percent.<sup>1067</sup> This percentage was based on the national average of ‘the proportion of women working in non-traditional occupations’ in Canada.<sup>1068</sup> It was ordered that the company had ‘to hire at least one woman for every four non-traditional jobs filled in the future’ until the percentage had been achieved.<sup>1069</sup> The quota was only accepted by the Canadian Supreme Court because it acknowledged the need to ‘break a continuing cycle of systemic discrimination’<sup>1070</sup> by ‘look[ing] to the past patterns of discrimination and ... destroy[ing] those patterns’ to prevent future discrimination.<sup>1071</sup> The quota in question did not include an explicit temporal limit, but was meant to be applied only until the hiring goal of women had been achieved.<sup>1072</sup> The Canadian Supreme Court justified the use of quotas as a means of addressing systematic discrimination that existed in past and present hiring and promotion practices.<sup>1073</sup>

Whilst in the United States and Canada quotas are only applied through tribunal or court decisions, Australian legislation allows the use of quotas by employers in relation to gender discrimination. However, in *Jacomb*<sup>1074</sup> the quota of 50 percent for women in employment on the executive level was challenged by a

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<sup>1065</sup> Ibid.

<sup>1066</sup> *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114.

<sup>1067</sup> Ibid 1115.

<sup>1068</sup> Ibid.

<sup>1069</sup> Ibid.

<sup>1070</sup> Ibid 1116.

<sup>1071</sup> Ibid.

<sup>1072</sup> Ibid.

<sup>1073</sup> Ibid 1114.

<sup>1074</sup> *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250.

rejected male applicant in court.<sup>1075</sup> The Court argued that a strict quota of 50 percent was acceptable, because it was designed to further the substantive equality of women in the workplace and because the discriminatory practices were to be terminated as soon as the quota was achieved.<sup>1076</sup> The reasoning of the Court also involved the ‘inflexibility of quotas’, which makes the monitoring of quotas vital to ensure only a ‘limited impact’ on non-beneficiaries of affirmative action.<sup>1077</sup>

Overall, quotas are a limit to affirmative action that has the potential to increase the effectiveness of these policies based on their clarity and focus on goals. However, the use of quotas is forbidden for employers by most legislation in the countries investigated. Even though quotas can be applied by courts and tribunals they are rarely used. Only extreme cases of gender or racial discrimination, which also have a background of decades of systemic discrimination in a specific employment area, have justified the setting of quotas. Moreover, not all quotas include explicit temporal limits, even though this would be desirable due to the blatantly discriminatory nature of quotas against non-beneficiaries, and due to the fact that affirmative action needs to be goal-oriented and limited in time based on the definition of affirmative action developed in Chapter 2 of the thesis and the requirements for affirmative action under *CERD* and *CEDAW*.

## **2. Numerical Goals**

Whilst quotas and numerical goals share in common the setting of a specific number or percentage of qualified individuals of a certain group in order to recruit, train or promote them, they differ in regards to the entire hiring process. Numerical goals are more flexible than quotas. Numerical goals, unlike quotas, only require employers to make a genuine effort to address the issue of systemic

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<sup>1075</sup> *Jacomb* [2004] FCA 1250 [62], [64], [65]. In *Jacomb*, the 50 percent quota was based on section 7D of the *Sex Discrimination Act 1984* (Cth).

<sup>1076</sup> *Jacomb* [2004] FCA 1250 [65]; Julie O’Brien, ‘Affirmative Action, Special Measures and the Sex Discrimination Act’ (2004) 27 (3) *University of New South Wales Law Journal* 843.

<sup>1077</sup> *Jacomb* [2004] FCA 1250 [65].

discrimination.<sup>1078</sup> The setting of numerical goals takes characteristics like race or gender into consideration only as one of many factors, which means that non-beneficiaries can also be hired.

Numerical goals can be set in different ways. They can be set as plain numerical goals without any temporal limitations, but with the purpose of being ended as soon as the number is achieved. Alternatively, numerical goals can be set including specific timetables. The latter are closer to affirmative action based on the requirements of my definition of affirmative action of Chapter 2 and under *CERD* and *CEDAW*, which emphasise the necessity of both numerical goals and temporal limitations.

In this thesis, numerical goals have been identified in specific affirmative action legislation and government regulations regarding affirmative action measures in all countries in the case studies.<sup>1079</sup> Whilst numerical goals are specifically outlined in the legislation and regulations of the United States and Canada, Australia's legislation does not specifically mention numerical goals, but government guidelines on special measures make it clear that they are able to accommodate numerical goals.<sup>1080</sup> All countries investigated apply numerical goals in different ways. The discussion that follows is divided into the subcategories of numerical goals including timetables, and numerical goals in which temporal limits are only implied.

#### **a) Numerical Goals With Temporal Limits**

Numerical goals with temporal limits have been used in the United States and Canada. In the United States, voluntary affirmative action includes goals and timetables. Moreover, in the United States and Canada, government regulations which are mandatory for government contractors, also apply goals and

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<sup>1078</sup> Labour Canada – Human Resources and Skills Department Canada, *Employment Equity in Your Workplace – Federal Contractors Program: Introduction – Appendix* (2009) 8.

<sup>1079</sup> In the United States, *Title 41 of the Code of Federal Regulations* includes numerical goals. In Canada, numerical goals have been identified in the *Employment Equity Act 1995*. In Australia, the *Sex Discrimination Act 1984* (Cth) implies the allowance for numerical goals.

<sup>1080</sup> Australian Human Rights Commission, *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* (2004) 3.

timetables.<sup>1081</sup> In the United States, these regulations differ with respect to the application of goals and timetables for non-construction contractors (service and supply) and construction contractors of the federal government.<sup>1082</sup> Whilst non-construction contractors apply annual placement goals, which are investigated under negative limits, only construction contractors of the federal government use numerical goals.<sup>1083</sup>

In the United States, numerical goals and timetables for voluntary affirmative action have been identified in *Title 29 of the Code of Federal Regulations*. In the event that employment discrimination regarding gender or race is detected by a self-analysis of a company, the employer is entitled to take action in the form of affirmative action.<sup>1084</sup> The employer is allowed to take ‘reasonable action’, which includes the setting of numerical targets in employment.<sup>1085</sup> Measures have to be systematically monitored in order to ensure their ability to achieve equity outcomes as soon as possible.<sup>1086</sup>

Mandatory affirmative action in the United States applies to federal construction contractors, who have to set up goals and timetables for women and minorities that are ‘expressed in percentage terms for the Contractor’s aggregate workforce in each trade on all construction work in the covered area’.<sup>1087</sup> These goals have to be set annually, defining goals for minorities and goals for women separately.<sup>1088</sup> Construction contractors are expected to make substantial progress towards the achievement of these goals ‘in each ... [trade] during the [time] period specified’.<sup>1089</sup>

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<sup>1081</sup> Voluntary affirmative action policies are established under *Title VII of the Civil Rights Act of 1964* and *Title 29 Code of Federal Regulations (29 CFR) §1608.4(c) (1)*.

<sup>1082</sup> *Title 41 Code of Federal Regulations (41 CFR) § 60-20.1*.

<sup>1083</sup> See Chapter 4 for more information. Government contractors can include ‘contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of \$10,000 including those construction employees who work on a non-Federal or non-Federally assisted construction site’. *41 CFR § 60-4.1*.

<sup>1084</sup> *29 CFR §1608.4(c); §1608.4(c) (2) (i)*.

<sup>1085</sup> *Ibid §1608.4(c) (1)*.

<sup>1086</sup> *Ibid*.

<sup>1087</sup> *41 CFR § 60-4.2(d) (2)*.

<sup>1088</sup> *Ibid*.

<sup>1089</sup> *Ibid § 60-4.3(a) (4) 2*.

Goals and timetables have to be specified in an affirmative action program, which also includes the ‘maintenance of an updated list of minority and female recruitment sources; the development of on-the-job training opportunities; the submission of an annual review meeting about the company’s progress with its affirmative action programs; the direction of recruitment efforts towards women and minorities; and an annual review process which focuses on the performance of supervisors under the contractor’s affirmative action obligations.’<sup>1090</sup> Moreover, for monitoring purposes, the numerical goals and timetables have to be published in the Federal Register. Goals and timetables can be set both by the construction contractors of the federal government, and also by the Office of Federal Contract Compliance Programs (OFCCP).<sup>1091</sup> The OFCCP uses workforce and demographic data for specific geographical areas of the construction project in order to determine hiring goals for female and minority workers.<sup>1092</sup> These numerical goals and timetables are applied to each construction trade of the project.<sup>1093</sup>

Although affirmative action programs for construction contractors of the federal government of the United States include timetables, they may not satisfy the requirement of a temporal limit on affirmative action. A temporal limit requires an end point – or at least a preliminary end point – to an affirmative action measure. *Title 41 of the Code of Federal Regulations* includes the requirement of goals and timetables for affirmative action, but not a definite end point to them.<sup>1094</sup> These affirmative action programs have to be updated annually, and do not indicate a concrete deadline as such. Of course, it could be assumed that as soon as the construction contract ends, the affirmative action policy ends. However, contracts can last for many years or can be renewed at any time. Anticipating that the end of the construction contract would be regarded as the specific temporal limit of the affirmative action policy, it remains questionable if this situation meets the requirements of a temporal limit. Temporal limits of affirmative action have to be specific. The requirement of an annual update for

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<sup>1090</sup> Ibid § 60-4.3(a) (7)(a)-(p).

<sup>1091</sup> Ibid §§ 60-4.4(b); 60-4.6.

<sup>1092</sup> Ibid § 60-4.6.

<sup>1093</sup> Ibid.

<sup>1094</sup> Ibid § 60-20.1.

affirmative action indicates that these policies are regarded as a permanent solution for the duration of the contract, which leaves them open to the criticism that they are a permanent measure and thus amount to unwarranted discrimination against non-beneficiaries. This would disqualify them as affirmative action based on the definition of affirmative action in Chapter 2 and the international treaties of *CERD* and *CEDAW*.

In contrast to the United States, Canada's specific affirmative action legislation, which applies to the civil service as well as federally regulated private sector employers, not only allows, but requires, the implementation of affirmative action.<sup>1095</sup> The *Employment Equity Act 1995* defines numerical goals as a 'number or percentage of qualified individuals in a designated group who are to be recruited, trained and promoted in a specific period of time, based on the degree of under-representation identified in the workforce analysis'.<sup>1096</sup> This definition already includes the requirements for an affirmative action policy based on my definition of affirmative action established in Chapter 2 and its requirements under *CERD* and *CEDAW*. Numerical goals can be set as short-term goals from one to three years, and long-term goals can last more than three years.<sup>1097</sup> Numerical goals have to be implemented by employers if an underrepresentation of certain designated groups is established within their workforce.<sup>1098</sup> The workforce has to be representative of the Canadian labour market.<sup>1099</sup>

The *Employment Equity Act 1995* includes employment equity plans. This type of legislation includes elements of both types of affirmative action. It furthers impartiality in the hiring process, and it can include numerical goals and timetables. These plans have to be monitored by employers in order to ensure reasonable progress towards employment equity.<sup>1100</sup> The Act requires employers

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<sup>1095</sup> The specific affirmative action legislation investigated in Canada is the *Employment Equity Act 1995*; *Employment Equity Act 1995*, s 5(a).

<sup>1096</sup> Labour Canada, above n 1078, 7-8.

<sup>1097</sup> *Employment Equity Act 1995 (EEA 1995)*, c 44, s 10 (3).

<sup>1098</sup> *Ibid* s 10 (1), (2).

<sup>1099</sup> Labour Canada, above n 1078, 5.

<sup>1100</sup> *EEA 1995* ss 11, 12.

to undertake a ‘periodic review and revision’ of these plans.<sup>1101</sup> The process of revision can include updating short term numerical goals, and adapting to changing circumstances in order to achieve the desired goals.<sup>1102</sup> Moreover, the Act outlines how to establish, maintain and file employment equity records for monitoring and accountability reasons.<sup>1103</sup> The requirements in the Act are enforced through the use of monetary penalties that can be applied to private sector employers failing to file an employment equity report, or failing to include the relevant information in the report that has to be submitted to the Federal Human Rights Commission.<sup>1104</sup> Monetary penalties can range from \$10,000 to \$50,000.<sup>1105</sup>

Furthermore, similar to the United States, Canada’s guidelines and regulations of federal agencies include limits for affirmative action, like the Federal Contractors Program.<sup>1106</sup> Eligible contractors to the federal government have to implement affirmative action measures in order to bid for government contracts.<sup>1107</sup> Employment equity policies can include numerical and non-numerical goals as well as short- and long-term deadlines.<sup>1108</sup> Federal contractors of the program have to set specific goals and temporal limits to fulfil their obligations. These requirements qualify these measures as affirmative action, because they include the necessary components of goal-oriented and temporal limits to them in accordance to the requirements of the definition for affirmative action in Chapter 2 and *CERD* and *CEDAW*.

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<sup>1101</sup> Ibid s 13.

<sup>1102</sup> Ibid.

<sup>1103</sup> Ibid s 17.

<sup>1104</sup> Ibid s 35.

<sup>1105</sup> Ibid s 36(2).

<sup>1106</sup> The Federal Contractors Program is a voluntary non-statutory program, which is administered by Human Resources and Skills Development Canada. The voluntary nature of this program is based on the fact that only contractors to the federal government have to implement affirmative action, which of course, depends on the contractor who has to voluntarily enter such an enterprise. Eddy SW Ng and Ronald J Burke, ‘A Comparison of the Legislated Employment Equity Program, Federal Contractors Program, and Financial Post 500 Firms’ (2010) 27(3) *Canadian Journal of Administrative Sciences* 225-27.

<sup>1107</sup> Carol Agocs, ‘Canada’s Employment Equity Legislation and Policy 1987 – 2000: the Gap between Policy and Practice’ (2002) 23(3) *International Journal of Manpower* 260. The Federal Contractors Program does only apply to employers with 100 or more employees, ‘who wish to sell goods or services to the federal government valued at \$200,000 or more’: at 260.

<sup>1108</sup> Labour Canada, above n 1078, 5.



### **b) Numerical Goals Without Temporal Limits**

Numerical goals without temporal limits focus obviously on outcomes which are not linked to a specific timeframe. The application of affirmative action measures end automatically once the numerical goal has been achieved.

Numerical goals without temporal limits have been identified in the Australian *Sex Discrimination Act 1984* (Cth).<sup>1109</sup> This Act allows for a wide range of affirmative action measures which also includes numerical goals,<sup>1110</sup> but does not outline any specific temporal limits. The Act does, however, mention that special measures are not allowed for a purpose that has already been achieved.<sup>1111</sup> This wording can be interpreted as an outcome limit that focuses on the result of affirmative action rather than on setting temporal limits to it. Arguably, this type of numerical goal neither meets the requirements of the definition for affirmative action developed in Chapter 2 nor the requirements for affirmative action under *CERD* and *CEDAW*, because it lacks the setting of a specific temporal limit.

Overall, numerical goals can be applied more flexibly than quotas. It has been demonstrated that there are different types of numerical goals, of which only numerical goals with specific temporal limitations qualify as affirmative action based on the definition of affirmative action in Chapter 2 and *CERD* and *CEDAW*. In all the countries investigated, this type of limit could only be found in the specific affirmative action legislation of Canada, where explicit guidelines for monitoring the progress of these policies serves as an indication for regular updates to ensure their effectiveness.

### **B. Negative Limits**

Negative limits do not set specific numerical or temporal limits to affirmative action in advance, but focus on trigger points that have to be reached to justify the application of these policies. In addition, constitutional theories about the implementation of affirmative action set negative limits to these policies. The

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<sup>1109</sup> *Sex Discrimination Act 1984* (Cth) (*SDA 1984*) s 7D (1).

<sup>1110</sup> Stephens, above n 1060, 36.

<sup>1111</sup> *SDA 1984* s 7D (4).

case studies of the United States, Canada and Australia identified three negative limits: annual placement goals, Supreme Court theories to limit the application of affirmative action, and general constitutional limitation clauses that can be applied to affirmative action.

### **1. Annual Placement Goals**

Annual placement goals are numerical goals that are set annually.<sup>1112</sup> This type of limit is different to numerical goals that have been investigated above under the category of positive limits based on the differences in their establishment. Annual placement goals are set to avoid adverse impacts on women and minorities, and they are put in place as soon as federal agencies are able to detect such an adverse impact due to workforce data. As soon as the adverse impact is resolved the policy can be ended until an adverse impact is detected again, which triggers the re-application of the affirmative action measure.

Negative limits are applied by government regulations for federal non-construction contractors (service and supply) in the United States.<sup>1113</sup> Annual placement goals are established for a certain job group and must be proportional to the ‘availability figure derived for women and minorities for that job group’.<sup>1114</sup> The proportional representation for women and minorities is achieved by flexible numerical goals that take gender or race into consideration as one factor in the hiring process.<sup>1115</sup> Goals and timetables for non-construction contractors regarding minorities and women are set as a percentage annual placement goal which includes a single goal for all minorities. The hiring process for federal non-construction contractors has to avoid adverse impacts on women and minorities, which is automatically suggested by federal agencies, if the selection rate for women or any specific minority group is less than 80 percent of the rate for the group with the highest selection rate.<sup>1116</sup> In the event this

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<sup>1112</sup> 41 CFR § 60-2.16(e) (1).

<sup>1113</sup> See Chapter 4 for more specific information.

<sup>1114</sup> 41 CFR § 60-2.16(c).

<sup>1115</sup> Ibid § 60-2.16(e) (2)-(3).

<sup>1116</sup> Ibid § 60-3.4(D), which states that if the selection rate for ‘any race, sex or ethnic group is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate’ an adverse impact on women and minorities is suggested. The section further states that ‘[a] greater

percentage is reached, affirmative action has to be applied to resolve the adverse impact. Annual placement goals constitute a negative limit, because they are only applied if a certain percentage is reached which proves an imbalance regarding gender and race in the workforce. They also serve as targets and are used to measure the program's progress in achieving them.<sup>1117</sup>

The way annual placement goals are applied means they are part of a permanent positive response to discrimination. Instead of temporal limits, annual placement goals have regular reassessments. For example, in the United States, as long as a federal non-construction contractor is working for the government, which can be unlimited in time, an annual report has to be filed to monitor the staff composition of the company. Underutilisation (underemployment) of a certain group occurs if eighty percent of the rate for the group with the highest rate is undercut. If this occurs, placement goals have to be set. Therefore, the constant reassessment of the affirmative action measure ensures that it is only applied when necessary, which is triggered by the underutilisation of a certain group.

Although annual placement goals are applied for the duration of a contract that can be unlimited in time, the setting of annual goals can be regarded as equivalent to the setting of a specific temporal limit. The time limit functions to either end the affirmative action measure or to prolong it for another specified period of time if necessary. Therefore, annual placement goals comply with the definition of affirmative action in Chapter 2 and the requirements for affirmative action under *CERD* and *CEDAW*.

## ***2. Supreme Court Approaches to Limit the Application of Affirmative Action***

Negative limits also include approaches developed by the Supreme Court of the United States in order to limit the application of affirmative action.<sup>1118</sup> The Court had to develop its own approaches to the application of affirmative action,

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than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact'.

<sup>1117</sup> Ibid § 60-2.16(a).

<sup>1118</sup> The Oakes-Test of the Canadian Supreme Court is investigated under the next point under 'General Constitutional Limitation Clauses', because it is directly based on the *Canadian Constitution*.

because the *United States Constitution* does not include a specific allowance for these policies, and it is disputed whether or not the Equal Protection Clause of the Fourteenth Amendment can be used as a basis for them.<sup>1119</sup> In chapter three, the thesis identified three approaches of the Supreme Court to limiting affirmative action in employment: the strict scrutiny test, the disparate treatment theory and the disparate impact theory.

The strict scrutiny test only allows for the application of affirmative action if it serves a compelling government interest and ‘is narrowly tailored to serve that interest’.<sup>1120</sup> For example, remedying past discrimination<sup>1121</sup> and increasing diversity have been approved by the Court as compelling governmental interests.<sup>1122</sup> The test focuses on whether or not affirmative action itself can be allowed in different situations, but does not focus on limiting these policies in relation to their goals or temporal end points. The test only determines if compelling government interests are involved and whether or not the specific affirmative action measure ‘unduly harm[s] members of any racial group’.<sup>1123</sup> Hence, the test does not help to set temporal or goal-oriented limits to affirmative action, rather the test supports the setting of affirmative action based on the requirements of my definition of affirmative action in Chapter 2 and *CERD* and *CEDAW* only if the goals and specific temporal limits for affirmative action are approved as a compelling governmental interest by the Court. This has not happened so far.

The disparate treatment theory and the disparate impact theory forbid discrimination of employees based on gender or race, and also declare as unlawful actions which adversely affect the status of employees based on the latter’s characteristics.<sup>1124</sup> The Court regards disparate treatment as intentional discriminatory behaviour, whilst disparate impact is regarded as practices that might be perceived as neutral, but result in disproportionate, negative impacts on

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<sup>1119</sup> See Chapter 4.

<sup>1120</sup> Victor J Zupa, ‘The US Supreme Court Establishes a New Era of Affirmative Action for Federal Contracts’ (1996) 43 *Federal Lawyer* 40.

<sup>1121</sup> Mark D Plevin, ‘The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to certain Politically Responsible Bodies’ (1981) 67 *Virginia Law Review* 1235.

<sup>1122</sup> See also *Grutter v Bollinger* 539 US 306, 330-2 (2003).

<sup>1123</sup> *Grutter* (2003) 539 US 306, 341.

<sup>1124</sup> *Title VII of the Civil Rights Act 1964*, s 703(a).

women and minorities.<sup>1125</sup> The Court determines whether the complaining party can prove a disparate impact. A disparate impact exists if the employer involved is not able to demonstrate that the employment practice in question was a business necessity and no alternative employment practice could have been adopted.<sup>1126</sup> Both theories have been used by the Court to allow affirmative action only in specific discriminatory situations, which are established by those theories.<sup>1127</sup> However, goals or specific temporal limitations are not directly part of the Court's assessment. Hypothetically, goal oriented and temporally limited affirmative action could be used by the Court to correct discriminatory situations for women and minorities, but such an order would not be part of the assessment for disparate treatment or disparate impact theories.

Overall, the theories of the United States Supreme Court investigated above are not applied to set goals or temporal limits to affirmative action. However, the United States Supreme Court has made rare comments about temporal limits to affirmative action measures, for example, in *Grutter v Bollinger*.<sup>1128</sup> Justice Sandra O'Connor stated in 2003 that it could be expected 'that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today'.<sup>1129</sup> In the end, the approaches of the Court regarding the setting of limits for affirmative action do not satisfy the requirements for goal-oriented and temporally limited affirmative action based on the definition of affirmative action in Chapter 2 and the requirements for affirmative action under *CERD* and *CEDAW*.

### **3. General Constitutional Limitation Clauses**

The last negative limits identified in the case studies of this thesis are general constitutional limitation clauses. Whilst the *United States Constitution* is

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<sup>1125</sup> Robert L Norton, 'The New Disparate Impact Analysis in Employment Discrimination: *Emanuel v Marsh* in Light of *Watson*, *Atonio*, and the Failed Civil Rights Act of 1990' (1991) 56 *Missouri Law Review* 334.

<sup>1126</sup> *Civil Rights Act of 1991*, s 703(k).

<sup>1127</sup> The analysis of disparate impact of the *Title VII* was firstly used by the Supreme Court 'in employment discrimination cases in *Griggs v Duke Power Co*, 401 US 424 (1971) and disparate treatment analysis in *McDonnell Douglas Corp. v Green*, 411 US 792 (1973).

<sup>1128</sup> 539 US 306 (2003).

<sup>1129</sup> *Grutter* (2003) 539 US 306, 343.

ambiguous about the allowance of affirmative action,<sup>1130</sup> the *Canadian Constitution* supports these policies<sup>1131</sup> and the *Australian Constitution* entails the possibility of implementing them.<sup>1132</sup> Although the *Australian Constitution* includes the possibility of special laws for specific races if necessary,<sup>1133</sup> there are no general limitations included in the *Australian Constitution* that could be applied to such special laws.<sup>1134</sup> In the end, only the general limitation clauses of the *Canadian Constitution* might be applied to limit affirmative action, though this has not been done to date.<sup>1135</sup>

The first general constitutional limit that could be applied to affirmative action is section 1 of the *Canadian Constitution*, which limits guaranteed rights and freedoms to ‘reasonable limits prescribed by law’ and demands the latter be ‘demonstrably justified in a free and democratic society’.<sup>1136</sup> Section 1 is applicable to all sections of the Charter of Rights and Freedoms, and could hence also be applied to section 15(2), which includes the allowance of affirmative action.<sup>1137</sup> This general limitation clause is only applicable to laws, but not to policies and government programs, which means only affirmative action legislation could be affected by it.<sup>1138</sup>

In order to apply this limit, the affirmative action legislation involved would have to limit one of the guaranteed rights of the *Constitution*; secondly, it would need to reasonably justify this limitation.<sup>1139</sup> In order to determine these limitations the so-called Oakes-Test.<sup>1140</sup> This test has to prove that the law in

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<sup>1130</sup> See Chapter 4.

<sup>1131</sup> See Chapter 5.

<sup>1132</sup> See Chapter 6.

<sup>1133</sup> *Australian Constitution*, s51(xxvi).

<sup>1134</sup> See Chapter 6.

<sup>1135</sup> So far, the Canadian Supreme Court has only addressed section 1 in relation to equality rights of the *Charter* in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, in which the Court decided that section 1 of the *Charter* could not justify the requirement of Canadian citizenship included in a law for barristers and solicitors. See Chapter 5.

<sup>1136</sup> *Canadian Constitution* s 1.

<sup>1137</sup> See Chapter 5.

<sup>1138</sup> Jonathan L Black-Branch, ‘Entrenching Human Rights Legislation under Constitutional Law: the Canadian Charter of Rights and Freedoms’ (1998) 3 *European Human Rights Law Review* 326.

<sup>1139</sup> Joan Church et al, *Human Rights From a Comparative and International Law Perspective* (University of South Africa Press, 2007) 90.

<sup>1140</sup> The Oakes-Test is based on the Supreme Court case *R v Oakes* [1986] 1 SCR 103.

question pursues an important objective, which has to be rational and must not have ‘a disproportionately severe effect on the persons to whom it applies’.<sup>1141</sup>

Hypothetically, the Oakes Test provides a limit on the design of affirmative action laws, though it has never been used for this purpose. Firstly, the affirmative action legislation would have to pursue an important objective. Affirmative action aims to enhance substantive equality for women and minorities in employment. Secondly, the affirmative action legislation would have to be rational and not affect others negatively in a way that was disproportionate to achieving the affirmative action objective. Arguably, to satisfy this second part of the Oakes Test, affirmative action legislation should contain positive limits which are time or goal-oriented. Affirmative action legislation that lacks specific goals and temporal limits could amount to positive discrimination against non-beneficiaries over time, which could not be justified in a free and democratic society. Furthermore, these limits would have to be reassessed frequently to assure their necessity and to avoid positive discrimination. Overall, the Oakes Test provides a means of applying positive limits to affirmative action legislation in compliance with the definition of affirmative action developed in Chapter 2 and the requirements for affirmative action under *CERD* and *CEDAW*, because it focuses on setting limits to affirmative action legislation, which aim at the elimination of discrimination and can be temporally limited.

The second limit in the *Canadian Constitution* that could be applied to affirmative action is section 33, also called the ‘notwithstanding clause’,<sup>1142</sup> which allows legislation to be enacted even when it restricts rights under the *Charter*.<sup>1143</sup> This limitation clause enables the federal parliament or provincial legislatures to limit the application of several sections of the *Constitution*, including section 15(2) regarding affirmative action.<sup>1144</sup> Although the clause has not been applied to affirmative action, it could be used to set goal-oriented and temporal limits to affirmative action by the federal parliament or provincial

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<sup>1141</sup> Christine Bateup, ‘Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights’ (2009) 32 *Hastings International and Comparative Law Review* 541; *R v Oakes* [1986] 1 SCR 103, 138-9.

<sup>1142</sup> *Constitution Act 1982*, s 33 (1).

<sup>1143</sup> Black-Branch, above n 1138, 328.

<sup>1144</sup> *Constitution Act 1982*, s 33 (1).

legislatures. If legislators should decide to do so, specific reasons for such a limitation would have to be declared up-front.<sup>1145</sup>

Overall, general constitutional limitation clauses of the *Canadian Constitution* have the potential to impose goal-oriented and temporal limits to affirmative action, and are a useful model for how to apply constitutional limits to affirmative action in other jurisdictions.

## **V. CRITICAL ANALYSIS OF DIFFERENT APPROACHES FOR THE DESIGN OF AFFIRMATIVE ACTION UNDER THE LIBERAL THEORIES OF STATE**

In this section of the thesis, I return to the liberal theories of the state to consider which of the methods of limiting affirmative action are compatible with these theories. Based on this critical analysis, I will determine which of the identified limits for affirmative action can be accepted by all liberal political theories.

### ***A. Limits of Affirmative Action under the Liberal Theories of State***

Chapter 3 outlined a number of versions of liberal political theory and their relationship to affirmative action policies. Political liberalism, egalitarian liberalism and communitarian liberalism are all capable of accommodating affirmative action only if it is limited in some way. The rationales for the time limits vary for each theory. Each version of the liberal political theories is discussed below in order to determine the most appropriate way to set limits for affirmative action under political, egalitarian and communitarian liberalism.

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<sup>1145</sup> Jonathan L Black-Branch, 'Parliamentary Supremacy or Political Expediency? The Constitutional Position of the Human Rights Act under British Law' (2002) 23(1) *Statute Law Review* 76.



### **1. *Limits of Affirmative Action under Political Liberalism***

Political liberalism focuses on the remedying of historical injustice – and thus limits of affirmative action are related to the ending of the historical injustice.<sup>1146</sup> Affirmative action can only be applied under political liberalism until the detrimental contemporary effects of past discrimination have been remedied. Therefore, quotas and numerical goals with time limits and annual placement goals could be applied to affirmative action under political liberalism, because all of these limits provide timetables to end affirmative action at some point in time.

The setting of predetermined end points is crucial under political liberalism in order to prevent the occurrence of reverse discrimination through a prolonged application of affirmative action to groups that are no longer disadvantaged. As long as affirmative action is applied to remedy historical injustice, non-beneficiaries of these policies still belong to historically privileged classes, which provide them with better opportunities, for example in employment. However, this is only valid as long as the historical injustice has not been remedied. If affirmative action would be applied longer than necessary, the historical injustice that affirmative action attempts to remedy under political liberalism would occur again in form of the present injustice of non-beneficiaries of affirmative action.<sup>1147</sup>

The importance to determine when an affirmative action policy can be ended under political liberalism requires a comprehensive monitoring system that ensures that the policy is only applied as long as necessary. Timetables applied together with quotas and numerical goals provide the possibility to end or reassess the necessity of affirmative action when its deadline has been reached. How exactly timetables are set, for example as short-term or long-term measures, determines the accuracy of the monitoring process. The more often an affirmative action policy is assessed, the more accurate the monitoring status of historically disadvantaged groups will be. The status of belonging to a historically disadvantaged group is necessary for the continued justification of

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<sup>1146</sup> See Chapter 3 of this thesis for more details about political liberalism.

<sup>1147</sup> How it can be determined when historical injustice is remedied depends on the role of public reason, which is further elaborated in Chapter 3.

the application of affirmative action. Annual placement goals provide an annual assessment of affirmative action, which can result in the ending or prolonging of the policy based on its continued necessity. Quotas and numerical goals including short-term timetables are also a vital option as limits for affirmative action under political liberalism to serve the purpose of preventing the re-occurrence of historical injustice.

## ***2. Limits of Affirmative Action under Egalitarian Liberalism***

Egalitarian liberalism aims to achieve substantive equality in order to create a truly egalitarian society, and thus limits to affirmative action relate to an assessment of the level of equality in society at any one time, and how best to achieve equality into the future.

Affirmative action under egalitarian liberalism focuses not only on historically disadvantaged groups like political liberalism, but on all groups that experience discrimination. Therefore, the target group of affirmative action under egalitarian liberalism is more extensive because any basis for inequality is unacceptable. The ongoing phenomenon of inequality and the aim of affirmative action under egalitarian liberalism to achieve substantive equality require more open limits to affirmative action than under political liberalism.

The strong focus on substantive equality under egalitarian liberalism allows for the application of quotas and numerical goals with or without time limits and annual placement goals. However, numerical goals or annual placement goals might be favoured by egalitarian liberals over quotas because the former only require employers to make a genuine effort to eliminate discrimination in contrast to strict quotas. A more flexible way to set numerical goals corresponds better to the egalitarian way of thinking than the setting of strict goals that exclude non-beneficiaries of affirmative action. Annual placement goals are a vital option under egalitarian liberalism, because they constitute a positive measure to further substantive equality by allowing for flexible numerical goals and by annually assessing their results they ensure the success of affirmative action.

### ***3. Limits of Affirmative Action under Communitarian Liberalism***

Communitarian liberalism focuses on the common good, which includes the enhancement of communal values and the elimination of socioeconomic inequality. Limits for affirmative action in communitarian liberalism relate to a more complicated sense of community consensus. Communitarian liberalism focuses on moral equality of people, but also includes the acknowledgement of social differences between them in relation to their skills and social standing. However, different social standings can lead to the belief that wealthier people are superior to their poorer counterparts, which is regarded as unacceptable 'invidious discrimination' by communitarian liberals.<sup>1148</sup>

In contrast to political and egalitarian liberals, communitarian liberals focus on the equality within the community as a whole rather than the equality of groups or individuals within it. This means communitarian liberals take a long term view of the elimination of discrimination and are less concerned with reverse discrimination through affirmative action than other liberal political theories, because it regards the disadvantage of an individual like a non-beneficiary of affirmative action as acceptable for the greater goal of socioeconomic equality in the community. Therefore, limits for affirmative action could include quotas and numerical goals with or without timetables as well as annual placement goals. Communitarian liberals might favour quotas over the setting of numerical goals, because their strict enforcement can lead to more timely results.

### ***4. Conclusion about Limits under the Liberal Theories of State***

The critical analysis about limits under political, egalitarian and communitarian liberalism has revealed that all three liberal theories are able to accommodate quotas, numerical goals and annual placement goals. However, all three theories have their own preferences for applying these limits. Whilst political liberalism is concerned with the remedying of historical injustice, egalitarian liberalism aims to eliminate socio-economic inequality of individuals, and communitarian liberalism focuses on the achievement of substantive equality as a community

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<sup>1148</sup> Philip Selznick, 'Social Justice: A Communitarian Perspective' in Amitai Etzioni (ed), *The Essential Communitarian Reader* (1998) 63.

value, all three theories require temporal limits for affirmative action in order to accommodate these policies.

Overall, numerical goals with timetables and annual placement goals, which represent a certain form of numerical goals, are more acceptable under all three theories in contrast to quotas, which due to their strict setting and enforcement are less favoured by egalitarian liberals.

After all, affirmative action can only be allowed as long as the goals of each theory have not been achieved. The goals of political, egalitarian and communitarian liberalism equate to the achievement of social change in society. It is difficult to predict at what point in time social change of this magnitude will be achieved. However, until this point in time is reached, political, egalitarian and communitarian liberalism accept the application of affirmative action in one form or another.

### ***B. The Most Effective and Justifiable Form of Affirmative Action***

The idea of ending affirmative action as soon as social change is achieved implies that inequality in society will be ended at some point in time. However desirable this goal might be, it remains questionable whether it can be truly achieved. Even in the event it is achieved, would it be wise to end affirmative action legislation completely? The possibility that inequality would reoccur at a later point in time cannot be ignored. How should an affirmative action policy be designed to address inequality adequately in this context?

Based on the analysis of limits under the liberal theories of state above,<sup>1149</sup> it is my conclusion that the most appropriate way to set limits for affirmative action is to set numerical goals that include temporal limits. Instead of applying these limits as a positive limit by setting pre-determined numerical goals and timetables for affirmative action, this thesis regards the setting of numerical goals and timetables as a negative limit as more appropriate. In contrast to positive limits, negative limits are better suited to address the ongoing phenomenon of inequality, which requires a flexible application, constant

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<sup>1149</sup> See also Chapter 3.

monitoring and frequent reassessments of results, which can trigger the ending or prolonging of affirmative action policies based on their necessity.

Of all limits for affirmative action identified in the case studies of the comparator countries, a negative limit in the form of numerical goals and timetables is only applied in the United States in the form of annual placement goals. Annual placement goals include the setting of goals within an annual timeframe during the duration of a contract. In this way, annual placement goals contain a time limit for numerical goals that has to be reset each year for the duration of the contract. This approach reconciles two contradictory concepts: it contains temporal limits on an ongoing basis. As soon as an annual time limit is reached, the specific affirmative action measure has to be re-evaluated. If there is the need to re-apply the measure, it will be continued for another year. If it has achieved its goals, it can be ended. However, annual placement goals also contain a negative limit for affirmative action, which means that as soon as a certain percentage of disadvantaged groups in employment is reached, the application of affirmative action is ‘triggered’ again. This ensures that inequality is addressed on a permanent basis during the duration of a contract.

The way annual placement goals have been applied to federal contractors in the United States could be applied to affirmative action policies in general. It provides the setting for numerical goals and temporal limits on an annual basis for the ongoing application of affirmative action to tackle the phenomenon of ongoing inequality. Due to the annual assessment of the success of the policy, it can be evaluated on a frequent basis to ensure its effectiveness through monitoring procedures and timely adjustments. Moreover, in the event this policy has been successfully ended, it provides a way to tackle reoccurring inequality through its ongoing monitoring of percentages of disadvantaged groups in employment. If a certain percentage is reached, the latter serves as a trigger point to re-apply the affirmative action policy on the same terms as before. In this way, inequality is addressed adequately by applying all limits in a timely fashion: numerical and temporal limits that can be ended and applied again if necessary.

## VI. COULD AFFIRMATIVE ACTION BE A PERMANENT POLICY DESPITE ITS NEED FOR LIMITS?

Although it has been determined that political, egalitarian and communitarian liberalism require some sort of a temporal limit for the application of affirmative action, these time limits do not necessarily include predetermined temporal limits for specific affirmative action measures. In accordance to these liberal theories of state, it would only be necessary to ensure that affirmative action legislation, on which specific affirmative action measures are based, are ended once social change is achieved. This approach shifts the focus from setting positive limits in form of predetermined temporal limits on specific affirmative action measures to setting negative limits in form of proper monitoring procedures and ‘trigger points’ for the re-application of affirmative action to ensure that social change is pursued on an ongoing basis to target the ongoing phenomenon of inequality. However, could this approach be regarded as sufficient under the definition of affirmative action of Chapter 2 and the international treaties *CERD* and *CEDAW* to which all three comparator countries are members?

Chapters 1 and 2 elaborated the need for temporal limits under the definition of affirmative action developed for this thesis and the international treaties of *CERD* and *CEDAW*. In this context, how should temporal limits be designed to comply with the requirements of my definition and *CERD* and *CEDAW*? In light of the definition of affirmative action in Chapter 2, temporal limits can be regarded as broad, just requiring some sort of temporal restriction, which can range from the setting of specific temporal limits to the mere intention to end affirmative action as soon as it is deemed unnecessary in the far future. The statements of *CERD* and *CEDAW* about temporal limits also allow for a broad understanding of temporal limits. For example, *CERD* and *CEDAW* both stress that affirmative action should not lead to the ‘maintenance of separate rights’ for different groups, and that affirmative action has to be discontinued after its objectives have been achieved.<sup>1150</sup> Consequently, temporal limits for affirmative

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<sup>1150</sup> *CERD*, article 1 (4); *CEDAW*, article 4 (1).

action do not have to be pre-determined and specific, but only need some sort of formalised intention to be ended as soon as the goals of affirmative action have been achieved.<sup>1151</sup> This approach also allows for the application of affirmative action as a negative limit recommended above, which means that an affirmative action measure can fall dormant as soon as its required goals are achieved, and will automatically be resurrected when its aim is not achieved anymore.<sup>1152</sup>

Also, temporal limits might be best applied differently to affirmative action legislation and affirmative action measures which are based on the latter. Whilst affirmative action legislation could be sufficiently temporally limited by expressing a formalised intention to end its application as soon as the goals of affirmative action have been achieved by including a statement of the temporal nature of affirmative action legislation in its opening clauses, affirmative action measures are required to be more specific and would be implemented most appropriately in the form of numerical goals with timetables, for example as annual placement goals.

Numerical goals with timetables in the form of negative limits or annual placement goals are not only in compliance with the definition of affirmative action developed in Chapter 2, but also with *CERD* and *CEDAW*. Both international treaties stress that the maintenance of separate standards for different groups in society is not acceptable. However, the application of numerical goals and timetables set as a negative limit, for example as annual placement goals, would not maintain separate standards for different groups, because it can be ended as soon as its goals are achieved. The possibility of re-applying it in the event that a certain trigger point is reached does not equate to the maintenance of separate standards for different groups, because it only tackles re-occurring inequality.

Overall, the idea of temporally limiting affirmative action legislation is based on the belief that it is able to achieve its goal of substantive equality at some point in the future. However, this point is difficult to predict. Although the setting of

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<sup>1151</sup> See also Chapter 6, *Gerhardy v Brown* (1985) 159 CLR 106, in which the Court determined that a special measure can be unlimited in time as long as it will be terminated as soon as its goals are achieved.

<sup>1152</sup> This idea is elaborated above under point V B,

limits for affirmative action measures based on affirmative action legislation is necessary in order to justify them, these limits have to acknowledge the problem of the ongoing phenomenon of inequality. The need for temporal limits for affirmative action measures and the need to address the ongoing problem of inequality seem to contradict each other. However, negative limits in the form of numerical goals with timetables, for example in the form of annual placement goals, seem to be the best way of addressing inequality in a temporally limited and at the same time ongoing fashion. Multi-cultural societies are always at risk to fall victim to discrimination amongst its citizens, which requires an ongoing solution for an ongoing problem without maintaining separate standards for different groups by setting temporal limits to the measures that address this problem pro-actively.

## VII. CONCLUDING COMMENTS

The three comparator countries in this thesis – the United States, Canada and Australia – have implemented affirmative action policies in employment in very different ways: the United States is ambiguous in its application of affirmative action; Canada is very supportive of affirmative action; whilst Australia uses affirmative action reluctantly on a narrow scale only. Consequently, Canada, as the country with the most extensive application of affirmative action should have the lowest levels of discrimination and inequality in employment. However, in accordance to reports of the Canadian government, the application of affirmative action has not led to the desired results.<sup>1153</sup> This unexpected outcome leads to the question of why the extensive use of affirmative action in Canada has led to similar results of countries that have not taken the implementation of these policies as seriously as Canada.

The United States, Canada and Australia have implemented compulsory affirmative action policies mainly in the public service sector and government contracting, whilst affirmative action in the private sector is only applied on a

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<sup>1153</sup> See Chapter 5.



voluntary basis.<sup>1154</sup> Therefore, data available for a comparison of employment data for men, women and minorities focuses on public sector employment.

The United States' and Australia's approach to affirmative action have not led to the implementation of extensive monitoring procedures to collect data that could help to identify the success or failure of affirmative action. However, general workforce data is available, which is more detailed in the US than Australia and outlines the employment rates of white males, women and minorities in the public employment sector for different job categories. This data is collected by the US Equal Employment Opportunity Commission. The last data available from 2009 reveals essential gaps between the high employment rate of white males in contrast to the significantly lower employment rates of women and minorities in government employment.<sup>1155</sup>

In Australia, affirmative action in the public service sector does not require numerical goals or timetables, which makes it difficult to measure the effectiveness of these policies.<sup>1156</sup> Unlike the United States, Australia's affirmative action is only designed to assist women and minority groups in employment through measures that raise impartiality in hiring and promotion, but do not give them 'any advantage in competition'.<sup>1157</sup> However, the effectiveness of affirmative action can only be measured if its objectives are defined in clear goals. The lack of the latter and the more generally held approach of affirmative action towards equal opportunity in employment for women and minorities makes it hard to evaluate the success or failure of affirmative action measures.<sup>1158</sup> In Australia, the only data available to assess employment situations is general data about the participation of men and women in the workforce, which is collected by the Australian Bureau of Statistics. In 2010, the last available general workforce data revealed women's slow progress

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<sup>1154</sup> See Chapters 4-6 of this thesis; see also Richard N Appel, Alison L Gray and Nilufer Loy, 'Affirmative Action in the Workplace: Forty Years Later' (2005) 22 *Hofstra Labour & Employment Law Journal* 549-50.

<sup>1155</sup> US Equal Employment Opportunity Commission, *Statistics about Job Patterns for Women and Minorities* < <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo4/2009/index.cfm>>.

<sup>1156</sup> Beth Gaze, 'The Ambiguity of Affirmative Action in Australia' (1999) 15 (2) *Law in Context* 148.

<sup>1157</sup> *Ibid* 150-1.

<sup>1158</sup> *Ibid* 163.

towards pay equity and a lack of senior positions.<sup>1159</sup> The criteria of race in employment is not assessed by the Australian Bureau of Statistics, and the only Government reports in relation to race are reports on Indigenous Australians. These reports focus on social and health issues.<sup>1160</sup>

Overall, the available workforce data and government reports reveal a similar situation of women and minorities in all three comparator countries, even though the United States, Canada and Australia have taken very different approaches towards the implementation of affirmative action policies.

The focus on minority status and gender should have led to a more rapid advancement of these groups in employment in Canada, which has taken the implementation of affirmative action more seriously than the other countries investigated. How is it possible that the extensive application of affirmative action over many decades has not led to a more successful outcome for its beneficiaries in employment? Why is preferential treatment in form of numerical goals and timetables not able to establish proportional representation or equal results?

Beth Gaze claims that the interpretation of results of affirmative action depends strongly on the point of view of the person who assesses the situation. In general, women and minority groups regard equal results based on the application of affirmative action as a necessity to improve their situation in employment, whilst the majority group regards the absence of equal outcomes as acceptable and focuses instead on empowerment measures.<sup>1161</sup> In this context, Gaze stated that:

‘the absence of concern with measurable, demonstrable outcomes can be seen as showing a limited management and government commitment to affirmative action’.<sup>1162</sup>

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<sup>1159</sup> Australian Bureau of Statistics, *Composition and Distribution of Earnings and Hours* (2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0/>>; Gaze, above n 1156, 167-8.

<sup>1160</sup> For example, the ‘Bringing Them Home’ report of the Human Rights and Equal Opportunity Commission of 1997, the reports of the Royal Commission of Aboriginal Deaths in Custody from 1987 to 1991, and the report ‘Closing the Gap’ about health problems of Indigenous People. See the Australian Human Rights Commission, *Aboriginal & Torres Strait Islander Social Justice* (2012) <[http://www.hreoc.gov.au/social\\_justice/index.html](http://www.hreoc.gov.au/social_justice/index.html)>.

<sup>1161</sup> Gaze, above n 1156, 162.

<sup>1162</sup> *Ibid.*

However, Gaze stated also that ‘even if measurement of outcomes can be done, interpretation of the results is controversial’.<sup>1163</sup>

It might be questioned whether or not a disproportionate representation of women and minorities in employment is caused by discrimination of the majority group alone. A lack of effectiveness of affirmative action outcomes could be regarded as evidence that either the Act they are based on is too weak, affirmative action policies have not been implemented properly by the responsible authorities, or that the little impact on women and minorities in employment is evidence that these groups do not need affirmative action at all.<sup>1164</sup>

Gaze approaches this issue by stating that numbers should not be the only basis for the assessment of the effectiveness of affirmative action, but that the structure of women’s and minorities lives must be taken into consideration.<sup>1165</sup> In other words, equality of opportunity does not necessarily translate into equality of outcome. Different job categories might attract male and female employees differently as well as certain ethnic minorities. Different gender roles and different ethnic backgrounds might play a bigger part in choosing a profession than can be anticipated by the concept of proportional representation.

## VIII. CONCLUSION

The thesis commenced with the question of how to design affirmative action to tackle the ongoing phenomenon of inequality most effectively. The international treaties of *CERD* and *CEDAW* require goals and temporal limits for affirmative action. The case studies about the limits of affirmative action in member states of *CERD* and *CEDAW* - the United States, Canada and Australia - served as examples of how different countries have implemented affirmative action policies. Various limits for affirmative action have been identified in these

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<sup>1163</sup> Ibid 163.

<sup>1164</sup> Ibid.

<sup>1165</sup> Ibid 162.

countries, but only a few are in compliance with the requirement of temporal limits for affirmative action under *CERD* and *CEDAW*.

The thesis identified two different types of affirmative action in the case studies of the comparator countries, both of which have to be designed differently to ensure their effectiveness: one type of affirmative action aiming at equality of opportunity and the other at equality of outcome. Affirmative action aiming at equality of opportunity has been identified as being similar to anti-discrimination law, because it aims at a timeless goal by using measures that are non-invasive for non-beneficiaries of affirmative action. Whilst anti-discrimination laws prohibit discrimination and punish violations of the latter retrospectively, affirmative action that aims at equality of opportunity represents a pro-active approach to prevent discrimination at the workplace. Therefore, this thesis proposes that this type of affirmative action should be applied permanently as a pro-active addition to general anti-discrimination laws in countries that do not include any pro-active duties of preventing discrimination in their anti-discrimination laws.<sup>1166</sup>

In contrast to affirmative action that aims at equality of opportunity, affirmative action that is designed to enhance the equality of outcome in employment for women and minority groups needs clear goals and temporal limits or it can result in reverse discrimination of majority groups, which is not acceptable in democratic societies. Monitoring systems are essential to ensure that these policies are regularly updated and assessed to either end or prolong them.

It is the conclusion of this thesis that the ongoing phenomenon of inequality is most effectively addressed by affirmative action policies that are based on the example of numerical goals with timetables in form of negative limits or annual placement goals. The flexible way in which these limits can be applied represents an effective approach to tackling inequality. Numerical goals are set and re-assessed annually. If the affirmative action policy is successful it can be ended, if it is unsuccessful it can be prolonged for another year to be reassessed for the same purpose again. In the event the affirmative action policy is ended,

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<sup>1166</sup> The only country of the case studies of this thesis that includes pro-active duties in its anti-discrimination law is Canada, for example in its pay equity legislation.

ongoing monitoring procedures ensure that a certain percentage of disadvantaged groups in employment is met. The lack of a certain percentage of disadvantage groups serves as a trigger point for the re-application of affirmative action on the same terms. In this way annual placement goals are applied on an ongoing basis even though they include goals and temporal limits.

Overall, the thesis concludes that the comparator countries implement affirmative action through permanent legislative schemes without extensive monitoring systems in relation to the success of specific affirmative action programmes and measures. The absence of definite goals and temporal limits and monitoring systems might suggest that inequality is not a temporary issue, but a permanent part of the policy challenge in response to inequality. Hence, affirmative action might have to be redefined as an empowerment measure, whose progress still has to be monitored closely, but without focusing on a particular end.

If the implementation of affirmative action aiming at equality of outcome is to be taken seriously by Western governments, goals and temporal limits as well as their adequate monitoring is vital to the success of these policies. If goals, temporal limits and adequate monitoring systems for this type of affirmative action are not applied, this type of affirmative action cannot be justified in a free and democratic society. In this event it is better to rely only on empowerment measures.

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